Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMSON INC.,
F/K/A THOMSON MULTIMEDIA INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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December 16, 2003

QUESTIONS PRESENTED

1. Whether the export provisions of the Harbor Maintenance Tax, which this Court held unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), are not severable from the statute's import provisions, which Congress enacted together with the export provisions as part of a legislative compromise.

2. Whether this Court's holding in *United States Shoe* that the charge imposed by the export provisions of the Harbor Maintenance Tax constitutes a "tax" subject to the Export Clause of the United States Constitution applies as well to the charge imposed by the statute's import provisions, which operate in exactly the same way.

3. Whether the exemptions in the Harbor Maintenance Tax for (1) domestic cargo loaded or unloaded in Alaska and Hawaii, (2) a substantial part of the Columbia River, and (3) inland waterways are unconstitutional preferences for the ports of certain states in violation of the Port Preference and Uniformity Clauses of the United States Constitution.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Thomson Inc., f/k/a Thomson Multimedia Inc., was the plaintiff-appellant below.

The United States of America was the defendant-appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Thomson Inc. states the following:

Thomson Inc. is a wholly owned subsidiary of Thomson S.A., a publicly traded French company. Thomson S.A. has no parent company.

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PETITION FOR A WRIT OF CERTIORARI

Thomson Inc., f/k/a Thomson Multimedia Inc. ("Thomson"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

PRELIMINARY STATEMENT

This case concerns the constitutionality of the Harbor Maintenance Tax ("HMT" or "the Tax") as applied to imported goods. The Tax is an *ad valorem* federal excise charge assessed on the value of exported cargo, imported cargo, domestic cargo, and transportation of commercial passengers, whether loaded or unloaded from ships at United States ports and harbors. *See* 26 U.S.C. §§ 4461-4462. Five years ago, this Court held that the HMT is a "tax" and, as such, is unconstitutional as applied to exports. *See United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). *United States Shoe* did not concern a challenge to the Tax on imports. This case was designated as a test case for determining the validity of the HMT as to those goods, which are responsible for approximately $500 million in tax collections each year.

The Federal Circuit's holding produces a statute far different from the one Congress intended: the legislative history makes clear that Congress enacted a carefully crafted compromise pursuant to which exports and imports would be treated identically. That approach sought to minimize any competitive disadvantages between ports and to avoid retaliation by the United States' international trading partners. The court's judgment that the unconstitutional export provisions of the Harbor Maintenance Tax could be severed from the import provisions conflicts with this Court's cases explaining when a court may hold that Congress intended for an unconstitutional statutory provision to be severed.

The court of appeals' decision that the Harbor Maintenance Tax is not a "tax" as applied to imports cannot be squared with this Court's analysis in *United States Shoe*. This Court found that the HMT *ad valorem* fee on the

value of the goods bears no relation to the actual use of a port and thus is a "tax" in operation as well as in name. Finally, the Federal Circuit's decision that the Tax does not violate the Uniformity and Port Preference Clauses raises an issue of great importance. The court's analysis is inconsistent with this Court's decisions and those of the Fifth, Seventh, and D.C. Circuits that have applied the Port Preference Clause. The judgment below thus exacerbates uncertainty over when Congress can enact geographical exemptions to federal taxes required by the Constitution to be uniform throughout the country.

The Federal Circuit's error has enormous commercial consequences. More than 1,000 cases await final resolution of this case, with hundreds of millions of dollars at stake. The court's decision cannot be the subject of a circuit conflict, because all cases challenging the constitutionality of the Tax must be filed in the Court of International Trade, with appeals from that court subject to the Federal Circuit's exclusive jurisdiction. Thus, unless this Court reviews the Federal Circuit's judgment in this case, it assuredly would not have an opportunity to address the issues here except in review of summary dispositions.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 340 F.3d 1355. The opinion of the United States Court of International Trade (Pet. App. 20a-37a) is reported at 219 F. Supp. 2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2003. On November 7, 2003, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 16, 2003. Pet. App. 39a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Uniformity and Port Preference Clauses of the U.S. Constitution (art. I, § 8, cl. 1 and art. I, § 9, cl. 6, respectively) and the Harbor Maintenance Tax statutes (26 U.S.C. §§ 4461-4462) are reproduced at Pet. App. 40a-47a.

STATEMENT

1. In the early 1980s, Congress undertook to reform federal water resources programs to improve the Nation's ports and harbors. Intractable difficulties in getting approval for water development projects in the preceding 20 years had caused construction spending by the U.S. Army Corps of Engineers to drop by 78 percent, and port development projects in the United States lagged far behind those of other developed countries. S. Rep. No. 99-126, at 3 (1985); H.R. Rep. No. 99-251, Pt. 4, at 17 (1985) (noting that, under existing law, "19 separate procedural steps are required to be completed prior to project construction"). After four years of deliberation and dozens of committee hearings, Congress enacted the Water Resources Development Act of 1986 ("WRDA"), Pub. L. No. 99-662, 100 Stat. 4082. The WRDA was the first legislation in more than a decade to authorize development of new harbor facilities. S. Rep. No. 99-126, at 3.

An integral part of the compromises resulting in the WRDA's passage was the Harbor Maintenance Tax, which is codified in the Internal Revenue Code at 26 U.S.C. §§ 4461-4462. The Customs Service collects the Tax, which is used through the Harbor Maintenance Trust Fund to pay for harbor maintenance and development projects. *See id.* § 9505. By its terms, the HMT "impose[s] a tax on any port use." *Id.* § 4461(a). "Port use" is defined as the "loading" or "unloading" of commercial cargo on or from "a commercial vessel at a port." *Id.* § 4462(a)(1). The Tax applies to imports, exports, domestic cargo, and commercial passenger transport alike. *See id.* § 4462(a)(3) (defining "commercial cargo" as "any cargo transported on a commercial vessel, including passengers

transported for . . . hire"); *id.* § 4461(c)(1) ("The tax . . . shall be paid by . . . the importer, . . . the exporter, or . . . in any other case, the shipper.").

The statute contains three exemptions from the Tax relevant to this case. First, a "[s]pecial rule" exempts from the Tax domestic cargo shipped between the continental United States, and Alaska, Hawaii, or U.S. possessions. *Id.* § 4462(b). Second, another "[s]pecial rule" exempts part of the Columbia River in Washington and Oregon. *Id.* § 4462(a)(2)(C). Finally, the statute excludes inland waterways from the definition of "port," and thus operation of the Tax. *Id.* § 4462(a)(2)(A)(i).

Under the Harbor Maintenance Tax, the amount paid is based solely on the value of the cargo, assessed at a rate of 0.125 percent. *Id.* § 4461(b).[1] Although that *ad valorem* tax is nominally assessed on "port use," Congress did not require the amount of tax paid on behalf of any particular cargo to relate to any "port use" made by the vessel carrying that cargo. The Tax is not, for example, based on the cargo's weight, bulk, or any other factor that bears on the use made of a port, such as the length of time spent by a vessel in a port or the port services used.

2. In 1998, this Court held in *United States Shoe* that the Harbor Maintenance Tax as applied to exports violates the Export Clause. In a brief and unanimous decision, the Court flatly rejected the government's claim that the charge is a user fee for port services that falls outside the Export Clause's prohibition of any "Tax or Duty" on exports. First, the Court noted, "[t]he HMT bears the indicia of a tax. Congress expressly described it as 'a *tax* on port use,' 26 U.S.C. § 4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code." *United States Shoe*, 523 U.S. at 367.

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[1] The tax was originally set at 0.04 percent, but was more than tripled to 0.125 percent in the Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, Tit. XI, § 11214, 104 Stat. 1388, 1388-400, 1388-436.

Second, the Court held that the charge is "a tax on exports in operation as well as nomenclature." *Id.* "The value of export cargo . . . does not correlate reliably with the federal harbor services used or usable by the exporter" because "the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging." *Id.* at 369. Accordingly, "the tax . . . is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee." *Id.* at 363; *see also id.* at 370 (purported user "fee must fairly match the exporters' use of port services and facilities" "if we are to guard against . . . the imposition of a [tax] under the pretext of fixing a fee") (internal quotation marks omitted).

3. This case was pending when the Court decided *United States Shoe*. Petitioner Thomson Inc., a manufacturer, importer, and exporter of consumer electronics equipment, had filed suit in 1995 in the Court of International Trade ("CIT") challenging application of the Harbor Maintenance Tax to imports (as well as its now-invalidated application to exports). The CIT designated this suit as a test case for challenges to the Harbor Maintenance Tax as applied to imports. *See* Pet. App. 38a. It subsequently designated another test case raising similar legal issues for challenges to the Tax as applied to domestic unloadings.[2] More than 1,000 other cases challenging the Tax are currently being held in abeyance by the CIT.

Thomson pays more than $1 million annually in Harbor Maintenance Taxes on its imported cargo. *See* Pet. App. 3a. Aggregate taxes levied on all imported cargo are also substantial. In 2002, the Customs Service collected approximately $545 million in Harbor Maintenance Taxes on imports (more than 80 percent of the approximately

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[2] That case was filed in 2002 by CF Industries, Inc., which today petitions for certiorari to the same court of appeals judgment as Thomson. The court below decided both cases together (without consolidating them) in a single judgment. Pet. App. 1a-2a.

$653 million in total collections). *See* Pet. App. 48a (*2002 HMT* Table 3); *see also* Department of the Army, ANNUAL REPORT TO CONGRESS ON THE STATUS OF THE HARBOR MAINTENANCE TRUST FUND FOR FISCAL YEAR 1999, at 14, ¶ 40 (Feb. 2001) ("*1999 HMT Report*").[3]

On August 21, 2002, the CIT granted summary judgment for the government. Pet. App. 20a-37a. The CIT summarily followed the Federal Circuit's holdings in prior cases that the unconstitutional export provisions in the Harbor Maintenance Tax are severable. *Id.* at 22a. The CIT then applied this Court's reasoning in *United States Shoe* to hold that the Harbor Maintenance Tax is a tax and not a user fee, as the government argued. *Id.* at 23a.[4] The CIT concluded, however, that the exemptions in the statute – for Alaska and Hawaii, the Columbia River, and inland waterways – do not violate the Uniformity or Port Preference Clauses. *Id.* at 25a-37a.

4. The Federal Circuit affirmed. As to severability, the court held that it was "bound by [its] precedent in *Carnival* [*Cruise Lines, Inc. v. United States*, 200 F.3d 1361 (Fed. Cir. 2000)]" – a case involving the applicability of the Harbor Maintenance Tax to cruise line passengers rather than to imported goods – "to hold that the export provision of the HMT is severable from the remaining provisions of the statute." Pet. App. 6a.

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[3] Although the President is required by statute to submit such reports annually to Congress, *see* Water Resources Development Act of 1992, Pub. L. No. 102-580, § 330, 106 Stat. 4797, 4851, *reprinted at* 26 U.S.C. § 9505 note, the *1999 HMT Report* was the last one submitted. The Department of the Army has indicated to counsel for petitioner that it plans in 2004 to release a single consolidated report for the years 2000-2002, and has compiled tables for those years detailing both tax collections and expenditures based on publicly available information that it received from the United States Treasury.

[4] The government did not dispute that the HMT must comply with the Port Preference Clause regardless of whether it is a tax or a user fee. That clause prohibits port preferences by means of "any Regulation of Commerce or Revenue." U.S. Const. art. I, § 9, cl. 6.

The court next reversed the CIT's holding that the Harbor Maintenance Tax is a tax, instead finding that it is a user fee under the so-called "*Massachusetts* test," and therefore not subject to the Uniformity Clause. Pet. App. 7a-14a (applying *Massachusetts v. United States*, 435 U.S. 444 (1978)). The court conceded that its own opinion in *United States Shoe* had applied that same test to hold, as to exports, "'that the HMT . . . is *not* based on a fair approximation of use and, as such, is *not* a permissible user fee.'" *Id.* at 8a (quoting *United States Shoe Corp. v. United States*, 114 F.3d 1564, 1574 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998)) (emphases added). But it purported to distinguish that holding based "upon the strictness of the inquiry in the Export Clause context" and concluded that the identical charge as applied to "imports and domestic unloadings is a fair approximation of the use of the ports." *Id.* at 10a-11a.

The court then held that the express preferences for Alaska and Hawaii pass muster under the Port Preference Clause because they "alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic shipping." *Id.* at 16a-17a. The court declined to address the exemptions for the Columbia River and inland waterways on the ground they were not made "express" in the statute. *Id.* at 14a n.5.

REASONS FOR GRANTING THE PETITION

The Federal Circuit gravely misapplied this Court's precedents in declining to hold either that the Harbor Maintenance Tax as applied to imports is non-severable from the invalidated export provisions or that it is unconstitutional in its own right. The court's decision is contrary to this Court's cases determining Congress's intent to sever unconstitutional provisions. Here, the clear intent of Congress was to impose the Tax on imports and exports alike in a carefully crafted legislative compromise. Without the unconstitutional export strand – struck down by this Court in *United States Shoe* – the import provisions cannot survive. In addition, the Federal Circuit

misread *United States Shoe*, which explained the multiple reasons why the Harbor Maintenance Tax is a "tax" and not a user fee. Those reasons apply equally to the Tax on imports. Finally, the court below offered a novel and unconvincing explanation for why the HMT does not violate the Port Preference Clause. The Federal Circuit added a gloss on the Port Preference Clause that conflicts with the approaches of the Fifth, Seventh, and D.C. Circuits. This Court's guidance is needed on those important constitutional issues when Congress next addresses the financing of America's port needs.

Because the Federal Circuit has exclusive jurisdiction over appeals from the CIT, which in turn has "exclusive jurisdiction over challenges to the HMT," *United States Shoe*, 523 U.S. at 366 n.3, any appeal from the more than 1,000 pending cases would necessarily be to that circuit. Thus no other court of appeals will have an opportunity to address whether the Harbor Maintenance Tax as applied to imports is either non-severable from the invalidated export provisions or unconstitutional under the Uniformity Clause or the Port Preference Clause. Moreover, because this case is the last of the HMT "test cases," the Federal Circuit has penned its last substantive opinion on the subject. The pending cases thus will be resolved by mechanical application of the decision below. Given the number of cases involved, the monetary stakes, and the importance of the issues in giving Congress definitive guidance, this Court's review is warranted.

I. THE IMPORT PROVISIONS OF THE HARBOR MAINTENANCE TAX ARE NOT SEVERABLE FROM THE UNCONSTITUTIONAL EXPORT PROVISIONS

As the government acknowledged in briefing *United States Shoe*, a conclusion that the Harbor Maintenance Tax is unconstitutional for exports would "t[ear] apart" Congress's "carefully designed legislative scheme for the funding . . . of the Nation's ports," which was "an essential component of the complex legislative plan adopted in the

[WRDA] for the operation and improvement of vital but long-neglected port facilities." Reply Brief for the United States at 7, *United States v. United States Shoe Corp.*, No. 97-372 (U.S. filed Oct. 15, 1997). Now faced with this Court's decision in *United States Shoe*, the government recants, but a faithful application of severability precedents to the Harbor Maintenance Tax reveals the Federal Circuit's significant error. As part of a "carefully crafted compromise,"[5] Congress mandated that exporters and importers would be subject to the HMT, to prevent "disadvantag[ing] export dependent ports in contrast to import dependent ports"[6] and to avoid the "significant GATT problems" of an import-only tax.[7]

A. Severability Analysis Requires Careful Scrutiny Of Congress's Intent

This Court has consistently held that the severability of an unconstitutional provision depends on the intent of Congress. Using the normal tools for ascertaining Congress's intent, the court is to assess whether Congress "would not have passed [the statute] had it known [one] provision was invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985); *accord Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (Breyer, J., plurality); *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("whether a statute is severable is essentially an inquiry into legislative intent"). Of particular relevance to that inquiry is "the importance of the [provision] in the

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[5] *User Fees for Ports and Waterways: Hearing Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 14 (1985) (Sen. Packwood, Chairman) ("*1985 Senate Finance Hearing*").

[6] *Id.* at 19 (Sen. Hatfield).

[7] *Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing on H.R. 6 Before the House Comm. on Ways and Means*, 99th Cong., 1st Sess. 37 (1985) (Richard Abbey, Chief Counsel, U.S. Customs Service, discussing General Agreement on Tariffs and Trade) ("*1985 House Ways and Means Hearing*").

original legislative bargain." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

B. Congress's Intent Was To Treat Imports And Exports Alike For Tax Purposes

1. The history behind the enactment of the Harbor Maintenance Tax reveals that Congress "would not have passed" the import provisions of the Tax "had it known the [export] provision was invalid." *Brockett*, 472 U.S. at 506; *accord Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 767 (Breyer, J., plurality). The legislative history is replete with statements that Congress, in enacting that tax, intended to "minimize[] any possible competitive disadvantages among cargo types and U.S. ports." S. Rep. No. 99-228, at 5-6 (1986); *see, e.g.*, 132 Cong. Rec. 6206 (Mar. 26, 1986) (Sen. Hatfield) ("Ad valorem fees acknowledge the differences in ports' needs and commodity mixes."); *1985 House Ways and Means Hearing* at 35 (G. Edward Dickey, Office of the Ass't Secretary, Dep't of Army) (testifying on behalf of the administration that a "systemwide ad valorem fee . . . doesn't disturb in any way the competitive position among the various ports"). Crucial to the legislative compromise was ensuring that the Tax did not discriminate in favor of "those ports [that] are export-dependent, as against those ports which are more related to imports." *1985 Senate Finance Hearing* at 17 (Sen. Hatfield); *see* S. Rep. No. 99-126, at 9 ("The debate in some cases is between . . . bulk cargo and containerized cargo ports. . . . [The bill] imposes a harbor maintenance tax, one that will be uniform across the nation.").[8] Plainly, the tax left standing by *United States Shoe* discriminates against import-dependent ports and is thus not a tax that Congress would have enacted in 1986.

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[8] As the legislative history indicates, exports consisted largely of bulk cargo, such as steel or grains, whereas imports consisted largely of "containerized" goods, such as the consumer electronics petitioner manufactures. *See* H.R. Rep. No. 99-251, Pt. 4, at 25-26. Thus, "bulk cargo and containerized cargo ports" (S. Rep. No. 99-126, at 9) are other names for export-dependent and import-dependent ports.

In addition, Congress's decision to apply the Tax to both importers and exporters furthered its intention to craft a revenue measure that would comply with the Nation's international trade obligations. As Congress recognized, a user fee imposed on both imports and exports would satisfy GATT, but a tax on imports alone would be highly vulnerable to a challenge under GATT.[9] *See, e.g.*, *1985 House Ways and Means Hearing* at 37 ("imposing [the HMT] only on imports would present significant GATT problems" so "it was decided to impose the fee on both exports and imports") (Chief Counsel, U.S. Customs Service); *1985 Senate Finance Hearing* at 59 (questioning whether HMT is "consistent with GATT") (Sen. Packwood). Indeed, in 1998, the European Commission initiated proceedings against the United States before the World Trade Organization ("WTO"), claiming that "the HMT may constitute an infringement of GATT."[10] The European Union continues to identify the Harbor Maintenance Tax as a trade barrier in violation of international agreements.[11]

Finally, the Harbor Maintenance Tax – in the precise form enacted by Congress – was essential to the passage of the entire WRDA. The "failure of Congress to write a

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[9] *See, e.g.*, GATT Art. VIII:1(a) ("fees and charges . . . shall not represent . . . a taxation of imports"); *id.* Art. II:2(c) (permitting assessment on imports of "fees or other charges commensurate with the cost of services rendered"). Such concerns were not speculative. *See Mexico, et al. v. United States* (Superfund Taxes), GATT Doc. L/6175 (June 17, 1987), *reported in* BISD 34th Supp. 136-66 (1988); *European Community, et al. v. United States* (Customs User Fee), GATT Doc. L/6264, ¶ 125(a) (Nov. 25, 1987) (holding "*ad valorem* . . . merchandise processing fee," also enacted in 1986, "inconsistent with the obligations of Articles II:2(c) and VIII:1(a)"), *reported in* BISD 35th Supp. 245 (1988).

[10] Request for Consultations, *United States – Harbour Maintenance Tax*, DS118 (WTO Feb. 16, 1998). Canada and Japan have intervened in that proceeding, which is pending before the WTO.

[11] European Comm'n, *Report on United States Barriers to Trade and Investment – 2002*, at 19 (Nov. 2002) (complaining of "excessive nature" of HMT).

new water law for nearly a decade," the Senate report explained, was attributable to disputes about which entities would bear the costs of port improvements, which was "key to this legislation." S. Rep. No. 99-126, at 5; *see also* 131 Cong. Rec. 30,754 (Nov. 6, 1985) (Rep. Foglietta) ("ad valorem fee . . . br[oke] the longstanding impasse on the omnibus water resources bill"); *id.* at 31,614 (Nov. 13, 1985) (Rep. Borski) ("fee was essential to win passage of this very important legislation"); 132 Cong. Rec. 33,325 (Oct. 17, 1986) (Sen. Bradley) ("compromise on . . . port user fees" "breaks a decade-long stalemate which was caused by the debate over how to finance these projects").

Indeed, the Reagan administration insisted on the inclusion of the Harbor Maintenance Tax that was enacted with the WRDA,[12] and threatened to veto the House bill based on "a number of major shortcomings that render it unacceptable," including "the ad valorem fee provisions applicable to ports[, which] are flawed."[13] Due to the administration's position, "any amendments to change the cost sharing in the Senate bill would cause the bill to

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[12] In June 1985, the Reagan administration reached an agreement with the Republican leadership of the Senate, pursuant to which "the administration . . . agreed to drop its opposition to the funding of new water projects" and the Senate agreed to "enact legislation providing for non-Federal cost sharing reforms in the water project area," including "a 0.04 percent ad valorem tax on imports and exports." 131 Cong. Rec. S8631, S8631 (June 21, 1985) (Sen. Dole); *see* 132 Cong. Rec. 6234-35 (Mar. 26, 1986) (Sen. Durenberger) ("[i]n return for the President's signature on the first water resource development legislation in 15 years, the Senate has agreed to . . . the institution of the first port use fee in our Nation's history"); *id.* at 33,320 (Oct. 17, 1986) (Sen. Stafford) ("It was Dave Stockman who spent hours in the majority leader's office some 15 months ago working out the details of the compromise on cost sharing that made this bill possible.").

[13] Letter from Robert K. Dawson, Ass't Secretary to the Army, to Sen. Stafford (Dec. 13, 1985), *reprinted in* 132 Cong. Rec. 4950-51 (Mar. 14, 1986); *see also* Letter from Robert K. Dawson, Ass't Secretary to the Army, to Sen. Dole (Mar. 3, 1986) ("weakening of the . . . user fee requirements must be avoided if we are to have a bill that will be signed by the President"), *reprinted in* 132 Cong. Rec. 4954 (Mar. 14, 1986).

either be vetoed . . . or . . . pulled down." 132 Cong. Rec. 5003 (Mar. 14, 1986) (Sen. Bumpers); *see also, e.g., id.* at 4958 (Sen. Packwood) ("the administration was going to veto any water projects until some accommodation was reached on sharing the cost and user fees"); 131 Cong. Rec. 31,613 (Nov. 13, 1985) (Rep. Bonker) (noting "administration's insistence on user fees and threats of a veto if one is not included in the bill").

That history thus makes it "evident that the Legislature would not have enacted" the HMT in its current state after *United States Shoe* and the decisions of the court below – an *ad valorem* tax paid by importers but *not* exporters. *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). In light of Congress's intention to avoid creating competitive disadvantages among ports and cargo types, to comply with the United States' international obligations, and to avert a threatened presidential veto of the WRDA if Congress enacted a Harbor Maintenance Tax different from the provisions in the Senate bill, there is every reason "for assuming that the [HMT] would have failed of passage without th[e] provision" invalidated in *United States Shoe*. *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (Burger, C.J., plurality); *see Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935) ("it is 'unthinkable' and 'impossible' that the Congress would have" enacted the law in effect today).

2. The WRDA's severability clause cannot bear the weight that the court below placed on it, in the face of clear congressional intent. *See* Pet. App. 6a; 33 U.S.C. § 2304 ("If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.").[14] As the Court has

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[14] It is the same boilerplate severability language that Congress has used for approximately 70 years, not a clause that expressly preserves the HMT's import provisions if the export provisions were found to be unconstitutional. *See Leavitt v. Jane L.*, 518 U.S. 137, 141 (1996) (per

explained, because severability is a "question of legislative intent," *Alaska Airlines*, 480 U.S. at 683 n.5, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause," *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968); *see Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997) ("a severability clause is 'an aid merely; not an inexorable command'").

In any event, the severability clause, which appeared in WRDA Title IX and which Congress inserted in the Navigation and Navigable Waters title of the U.S. Code, is inapplicable to the HMT, which Congress placed in the Internal Revenue Code. Indeed, the severability clause refers to "this Act" – meaning the WRDA – while Congress enacted the HMT as part of the separately identified "Harbor Maintenance Revenue Act of 1986." Pub. L. No. 99-662, Tit. XIV, § 1401, 100 Stat. 4082, 4266. Any doubt about the non-applicability of the WRDA severability clause is put to rest by the fact that Congress provided that the Internal Revenue Code severability clause applicable to tax statutes – which is identical to the WRDA severability clause – does not apply to the Harbor Maintenance Tax. *See* 26 U.S.C. § 4462(f)(3). Such an express exemption in the Tax Code would not be necessary if the WRDA severability clause applied to the HMT.

Finally, this Court has limited the "textual surgery" that may be performed pursuant to a severability clause, permitting the excision only of provisions that "enjoy[] a textual manifestation separate from [the unconstitutional] material." *Reno*, 521 U.S. at 882-83 ("A severability clause requires textual provisions that can be severed."). Here, the Federal Circuit's version of the statute – a Harbor Maintenance Tax that applies to imports, domestic shipments, and cruise passengers, but not to foreign exports – cannot be obtained by striking out one or more provisions that Congress enacted; instead, text must be *added* in contravention of this Court's repeated

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curiam); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 115-16 (1937).

admonition that it "will not rewrite a . . . law to conform it to constitutional requirements." *Id.* at 884-85 (internal quotation marks omitted; omission in original).[15]

C. The Federal Circuit's Reasoning Is Flawed And Inconsistent With This Court's Holdings

In reaching the opposite conclusion, the court of appeals held that it was bound by its own decisions in cases "involv[ing] only the application of the Harbor Tax to cruise passengers," *Carnival Cruise Lines*, 200 F.3d at 1366. In that context, the court held that the "unconstitutional application of the HMT to exports is severable from the rest of the statute and its applications." *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1358 (Fed. Cir. 2002). *See* Pet. App. 5a-6a.[16] Whether or not *Carnival*'s analysis was correct as to cruise ship passengers, the Federal Circuit's mechanistic application of that decision conflicts with specific indications that Congress intended to treat exports and imports the same way. Congress engaged in extensive deliberation of the application of the Tax to importers and exporters, whereas the legislative history is devoid of any discussion of the HMT's

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[15] Even when the express references to "cargo to be exported from the United States" are deleted, 26 U.S.C. § 4461(c)(1)(B), (c)(2)(A), the HMT still imposes a "tax on any port use," defined to include "the loading of commercial cargo on . . . a commercial vessel at a [United States] port," and to be paid "in any . . . case" other than imports by "the shipper," "at the time of unloading." *Id.* §§ 4461(a), (c)(1)(C), (c)(2)(B), 4462(a)(1), (2)(A). Thus, even with excisions, the HMT's text still includes foreign exports that are loaded on a commercial vessel at a United States port. Any further deletions would render the HMT inapplicable to imports or domestic shipments; instead, impermissible judicial redrafting is required to eliminate foreign exports, and only such exports, from the scope of the HMT.

[16] Without any examination of the different contexts, the Federal Circuit had also considered itself bound by its severability holding from the cruise line cases in prior cases involving application of the Tax to cargo shippers. *See Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000) (importers); *Florida Sugar Mktg. & Terminal Ass'n, Inc. v. United States*, 220 F.3d 1331, 1333 (Fed. Cir. 2000) (domestic shippers).

application to cruise ships.[17] And the cruise line provision is meaningless as a practical matter, accounting for less than 0.6 percent of HMT revenues since 1987.[18] In contrast, importers and exporters (and, since *United States Shoe*, importers alone) have paid more than 80 percent of the revenue collected by the Harbor Maintenance Tax. *See* p.6, *supra*. The court below therefore erred in finding that the import provisions of the HMT are severable from the unconstitutional export provisions.[19]

II. THE HARBOR MAINTENANCE TAX IS A TAX SUBJECT TO THE UNIFORMITY CLAUSE

The Uniformity Clause requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. If the charge imposed by the import provisions of the Harbor Maintenance Tax is a duty, impost, or excise, it is a "tax" subject to the Uniformity Clause and therefore must be uniformly applied throughout the U.S. The Federal Circuit erred at the first step of the analysis by concluding that the Harbor Maintenance Tax was a "user fee" and not a "tax."[20]

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[17] The House bill did not include cruise lines among the payers of the tax. The Conference Committee report makes no mention of the Senate bill's cruise line provision in adopting the Senate's proposal "with respect to the application of . . . the tax." H.R. Conf. Rep. No. 99-1013, at 228-30 (1986).

[18] *See 1999 HMT Report* Table 4; Pet. App. 48a (*2002 HMT* Table 3).

[19] The Federal Circuit based its severability determination on its conclusion that the Harbor Maintenance Tax was "designed to raise money" and, therefore, that the "remaining portions of the Harbor [Maintenance] Tax can function effectively and serve their purpose even after the invalid application has been excised." *Carnival Cruise Lines*, 200 F.3d at 1367. As shown above, Congress was not seeking to raise as much money as the Constitution permitted; instead, of vital concern was ensuring that the Tax applied to exports and imports alike. Accordingly, standing alone, the import provisions of the HMT do not "function in a *manner* consistent with the intent of Congress" and, therefore, are not severable. *Alaska Airlines*, 480 U.S. at 685.

[20] As we explain at pp. 23-30, *infra*, the Federal Circuit also should have held that the HMT violates the Clause's uniformity requirement.

A. The Harbor Maintenance Tax Is Not A User Fee But A Tax Subject To The Uniformity Clause

1. The Federal Circuit's analysis of the HMT as a user fee cannot be squared with *United States Shoe*

This Court held in *United States Shoe* that the Harbor Maintenance Tax is a tax rather than a user fee. Although that holding came in the context of exports, the Court's analysis applies with equal force to imports. "Congress expressly described [the HMT] as 'a *tax* on any port use,'" making no distinction between exports and imports. *United States Shoe*, 523 U.S. at 367 (quoting 26 U.S.C. § 4461(a)). Moreover, the *ad valorem* charge imposed on imports is no more related than the charge imposed on exports to any factor bearing on port use, such as "the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging." *Id.* at 369.

Under the tax, for example, expensive but small and light electronic computer chips are taxed far more than cheaper but larger and heavier commodities such as steel – despite the obvious fact that heavier and bulkier cargo, which often requires deep-draft vessels and thus a greater degree of dredging, places a greater burden on ports than lighter and smaller cargo. If the Harbor Maintenance Tax is a *bona fide* user fee that escapes any scrutiny under the Uniformity Clause, then it is hard to imagine how any levy could be deemed a tax. As this Court's questioning of the government at oral argument in *United States Shoe* illustrates, any such tax could be creatively characterized as a user fee. *See* Oral Arg. Tr., *United States Shoe*, 1998 WL 102578, at *12 (Court: "So if we accept your argument there is no gas tax. It's really a highway user fee .... [I]ncome tax is really a user fee for using the country's facilities."). No less than in *United States Shoe*, the Court should be especially wary of sanctioning the court of appeals' and the government's obliteration of any

meaningful distinction between a tax subject to constitutional scrutiny under the Uniformity Clause and a so-called user fee – especially under the same statute that the Court has already found to impose a tax.

2. Even under the *Massachusetts* test, the HMT is a tax

The court below sought to distinguish *United States Shoe* as limited to the Export Clause. It proceeded to apply the purportedly less stringent *Massachusetts* test, under which user fees are valid so long as each of the following requirements are met: the charge (1) must not discriminate against the constitutionally protected interest; (2) must be based on a fair approximation of use; and (3) must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *See* Pet. App. 7a-14a. The Harbor Maintenance Tax flunks all three elements.

First, as we explain below, the Tax discriminates in favor of certain states' ports in violation of the Uniformity and Port Preference Clauses. *See* pp. 23-30, *infra.*

Second, as *United States Shoe* held, "the tax . . . is not a *fair approximation* of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee." 523 U.S. at 363 (emphasis added). The court of appeals offered no explanation for its contrary conclusion that the Harbor Maintenance Tax *is* a "fair approximation" of port use for imports. Even if that incongruity were conceptually possible, this is not the case to sanction it because there is simply *no* reasonable relation between the *ad valorem* fee and port use, as this Court has already found. All that can be said is that the tax is assessed on port users – not that it *relates* in any way to the extent of their use. *See* Oral Arg. Tr., *United States Shoe*, 1998 WL 102578, at *13 (Court: "[W]hen we enunciated an exception for user fees, I didn't think that meant any charge imposed on users. . . . [T]hat would make it no limitation at all. So long as you impose the

tax through users, you can tax exports as much as you like.").[21]

Third, the HMT is improperly structured because it produces revenue far in excess of the government's needs. Since its inception, the Harbor Maintenance Trust Fund has carried a large and growing surplus, which now exceeds $1.873 billion. *See* Pet. App. 49a (*2002 HMT* Table 7). To be sure, this Court's dicta state that revenues and expenses need not match perfectly from year to year. *See Massachusetts*, 435 U.S. at 470 n.25. In *Massachusetts*, however, "the system of user fees ha[d] not come close to recovering the costs imposed" by the users. *Id.* at 469 n.24; *see also Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 719-20 (1972) (same). But the Court's dicta in no way sanction the stark situation presented here, where for 14 consecutive years the fund has not expended as much as it has received in revenues. If that growing surplus does not demonstrate that the Harbor Maintenance Tax is excessive in relation to the costs incurred by the government, then the standard is meaningless.

B. The Federal Circuit's Judgment Produces The Anomalous Result That An "Excise" Is Not A "Tax" In Different Constitutional Provisions

1. The Federal Circuit's conclusion proceeds from the flawed premise that a charge that constitutes a "Tax" or

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[21] It is noteworthy that, in its analysis in *United States Shoe* prior to this Court's decision, the Federal Circuit concluded that "the amount of the HMT has *no* relationship to the size or weight of the vessel or the necessary depth of the port required by the vessel. For example, low value bulk cargo *importers and exporters* use port facilities to a much greater extent than high value non-bulk cargo importers and exporters. Yet, even though bulk cargo exporters generally require a larger vessel and a deeper port, and therefore 'use' the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters." 114 F.3d at 1572 (internal quotation marks, citation, and alteration omitted; emphases added). In the decision below, the court offered no explanation for abandoning that conclusion.

"Duty" under the Export Clause, U.S. Const. art. I, § 9, cl. 5, is not a "Dut[y], Impost[] [or] Excise[]" under the Uniformity Clause, *id.* art. I, § 8, cl. 1. But an "excise" *is* a tax. *See, e.g., Black's Law Dictionary* 585 (7th ed. 1999) (defining "excise" as "[a] tax imposed on the manufacture, sale, or use of goods"). That definition accords with this Court's holdings. As Justice Cardozo explained for the Court, the classes of "duty, impost, or excise . . . include every form of tax appropriate to sovereignty." *Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937). Thus, an "excise" is a subset of "tax," and there can be no doubt that the HMT is an "excise" tax on goods. *See Fernandez v. Wiener*, 326 U.S. 340, 361 (1945) (explaining that an excise is a tax that "must be identically taxed in every state where it is found"). Yet the Federal Circuit's conclusion that the HMT is a "user fee" under the Uniformity Clause produces the inconsistent result that a charge that is a "tax" under the Export Clause cannot be a *subset* of a tax (an "excise") under the Uniformity Clause.

2. The cases on which the Federal Circuit relied are neither controlling nor apposite. Each involved flat or *ad valorem* taxes upheld under other constitutional provisions, including the Commerce and Takings Clauses, which contain *no* textual prohibition on taxes and thus are not directly applicable to the Uniformity Clause, which expressly covers taxes. *Cf. United States Shoe*, 523 U.S. at 368 ("'[O]ur decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid.'") (quoting *United States v. IBM*, 517 U.S. 843, 851 (1996)).

In any event, the charges in those cases each bore some reasonable, if imperfect, relation to the service for which the fee was assessed. *See, e.g., Massachusetts*, 435 U.S. at 468-69 (intergovernmental tax immunity) ("The four taxes, taken together, fairly reflect the benefits received, since three are [levied on a per-gallon or per-pound basis

and are thereby] geared directly to use, whereas the fourth, the aircraft registration tax, is designed to give weight to factors affecting the level of use of the navigational facilities."); *Evansville-Vanderburgh*, 405 U.S. at 718-19 (Commerce Clause) (finding flat $1 fee for each passenger emplaning a commercial liner, levied for the maintenance of state's airport facilities, to be a valid user fee where it was rooted in "distinctions based on aircraft weight [and] commercial versus private use" because "[c]ommercial air traffic requires more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes"); *see also Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 547 n.8 (1950) (upholding *ad valorem* tax against dormant Commerce Clause challenge where Congress specifically indicated such taxes were permissible).

Similarly, in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court held that a fee of 1.5 percent of any award recovered from the Iran-United States claims tribunal was a user fee rather than a taking requiring just compensation. There, however, the award recipient benefited generally in proportion to the size of the award, and it was arguably fair for those who benefited most from the tribunal to pay a greater share of its costs. The same is not true here, for higher value cargo does not necessarily equate with higher profits; a diamond importer may suffer a sizeable loss while a petroleum importer may reap large gains. As in *United States Shoe*, "the government has failed to present any facts suggesting that, even on average," "higher value merchandise . . . correlate[s] to a higher profit margin." 114 F.3d at 1574.[22]

Although in *United States Shoe* this Court declined to apply the *Massachusetts* line of cases, it nowhere sug-

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[22] Moreover, the Court in *Sperry* was careful to point out that the standard for upholding the *ad valorem* assessment under the Just Compensation Clause is lower than the standard that applies under the Commerce Clause, in which the *Massachusetts* test is rooted pursuant to *Evansville-Vanderburgh*. *See* 493 U.S. at 61 n.7.

gested that the *ad valorem* tax on exports – which did not bear even remotely on port use – would satisfy the *Massachusetts* standard. *See* 523 U.S. at 367-68; *see also Brock v. Washington Metro. Area Transit Auth.*, 796 F.2d 481, 485-86 (D.C. Cir. 1986) (Ginsburg, R.B., J.) ("The levy held constitutional in *Massachusetts* illustrates [the proper] meaning of 'fair approximation.' . . . [T]he amount of the fee was based on the *size and type* of aircraft . . . . [B]igger planes are more expensive for the federal safety system to accommodate.") (emphasis added). Although the Court has explained that "fair approximation" does not require perfect or even rigorous approximation, the Federal Circuit's announced rule amounts to no approximation at all. *See Evansville-Vanderburgh*, 405 U.S. at 717 (requiring a user fee to "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed"). Accordingly, as applied to imports, the Harbor Maintenance Tax is a tax, not a user fee.

3. The court below also claimed to find support in the legislative history, which explained that "value was 'the only acceptable basis'" for the fee because it "'minimizes any possible disadvantages among cargo types and U.S. ports which otherwise might result from user charges'" and would "minimize administrative costs." Pet. App. 12a (quoting S. Rep. No. 99-228, at 5-6). Rather than supporting the court's decision, however, the legislative history demonstrates that Congress understood that the *ad valorem* HMT is a tax, not a user fee. *See* H.R. Rep. No. 99-251, Pt. 4, at 29 (acknowledging that *ad valorem* assessment would be a "tax," while distinguishing fee based on tonnage as "not a tax").

Moreover, this Court has never held administrative convenience to be the sole factor in determining whether a purported user fee fairly approximates the cost of use.[23]

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[23] While effectively embracing that proposition here, the Federal Circuit in *United States Shoe* specifically rejected it. *See* 114 F.3d at 1574 ("Although the decision to impose the HMT on an *ad valorem* basis may have substantially reduced administrative costs, it is never-

And the notion that the *ad valorem* fee is simpler to administer than a tonnage fee is specifically contradicted in the legislative history, which conceded that a fee would "more easily be assessed on the basis of tonnage rather than value." *Id.* at 25; *see also id.* at 26 (noting "difficulty in determining the actual or transactional value of the article"); *id.* at 27 ("difficulty in administration").

III. THE HARBOR MAINTENANCE TAX VIOLATES THE PORT PREFERENCE AND UNIFORMITY CLAUSES

The Port Preference Clause precludes Congress from enacting preferences that favor "the Ports of one State over those of another." U.S. Const. art. I, § 9, cl. 6. The Uniformity Clause requires geographic uniformity, that is, the tax must "'operate[] with the same force and effect in every place where the subject of it is found.'" *United States v. Ptasynski*, 462 U.S. 74, 82 (1983) (quoting *Head Money Cases*, 112 U.S. 580, 594 (1884)).[24] The Harbor Maintenance Tax violates both constitutional commands.

A. Both Clauses Prohibit Naked Preferences Given To Ports Of A State

From its earliest cases, this Court has construed the Port Preference Clause "to import a prohibition against some positive legislation by congress" that entails "discrimination between States." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855).

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theless not based on a fair approximation of use. Since the HMT is not a valid user fee, it must be a tax."). In any case, the administrative convenience relied on by the court was simply Congress's decision to have the Customs Service collect the fee because it already collects other customs duties; but that convenience of collection has nothing to do with the basis on which the fee is calculated. *See* Pet. App. 12a (citing S. Rep. No. 99-228, at 10).

[24] As explained above, the court of appeals did not reach any Uniformity Clause issues beyond its erroneous holding that the Tax is a user fee and therefore not subject to the Clause. The CIT, on the other hand, relied on *Ptasynksi* in rejecting petitioner's Uniformity Clause arguments; as explained *infra*, the CIT's reasoning was faulty.

See also Louisiana Pub. Serv. Comm'n v. Texas & N.O. R.R., 284 U.S. 125, 131 (1931); *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908).

The Uniformity Clause also prohibits naked preferences. In *Downes v. Bidwell*, 182 U.S. 244 (1901), this Court unanimously agreed that an express preference in the form of a duty on goods shipped from Puerto Rico to the states would violate the Uniformity Clause *if* Puerto Rico were a "state" subject to that clause.[25] The issue that split the Court 5-4 was whether those provisions of the Constitution applied to Puerto Rico as a territory. A majority held that it was not a state under those clauses. *See also Territory of Alaska v. Troy*, 258 U.S. 101, 110-11 (1922) (same reasoning and rationale for Alaska Territory). On the same basis, a majority likewise indicated that the statute would have violated the Port Preference Clause, but for the fact that Puerto Rico is not a state.[26]

The Uniformity Clause has been construed to permit facial geographical discrimination, but only when the Court found it harmless because there was no discrimination in fact. In the *Head Money Cases*, for example, the Court upheld a head tax on non-citizens entering the United States through ports but not inland cities because

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[25] *See* 182 U.S. at 249 (Brown, J., announcing the judgment and conclusion of the Court) ("[i]f Porto Rico be a part of the United States, the Foraker Act imposing duties upon its products is unconstitutional, . . . by reason of a violation of the uniformity clause"); *id.* at 299 (White, J., concurring in the judgment) ("if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause"); *id.* at 345 (Gray, J. concurring in the judgment) ("in substance agreeing with the opinion of Mr. Justice White"); *id.* at 373-74 (Fuller, C.J., dissenting) ("so much of the Porto Rican act as authorized the imposition of these duties is invalid, and plaintiffs were entitled to recover").

[26] *See* 182 U.S. at 249 (Brown, J.) (duty violated art. I, "§ 9"); *id.* at 288 (White, J.) ("Subsidiarily, it is contended that the duty collected was also repugnant to the . . . preference clause[] of the Constitution."); *see also id.* at 352 (Fuller, C.J., dissenting) (setting out text of the Port Preference Clause and explaining that the "act on its face does not comply with the rule of uniformity, and that fact is admitted").

"the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." 112 U.S. at 595. The Court relied on the critical fact that "the law applies to all *ports* alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States." *Id.* *See also Regional Rail Act Reorganization Cases*, 419 U.S. 102, 159-60 (1974).

In *Ptasynski*, the Court's most recent Uniformity Clause decision, Congress had excluded certain Alaskan crude oil extracted from the arctic and mountainous regions – less than 20 percent of all Alaskan production – from a windfall profits tax because there were in fact *no* windfall profits due to the higher cost of drilling for oil in these regions. *See Ptasynski*, 462 U.S. at 77. On the basis that the subject of the tax – windfall profits – did not exist with regard to the exempt Alaskan oil, this Court upheld the exclusion. *See id.* at 85.[27] The cases exempting from coverage a geographic region in which the subject of the tax did not even exist, however, do not justify actual geographic discrimination where the subject of the tax – here, port use – plainly does exist in the three places exempted from the Harbor Maintenance Tax: Alaska and Hawaii, the Columbia River, and inland waterways.

B. The Harbor Maintenance Tax Contains Naked Geographical Preferences

The HMT violates the Uniformity and Port Preference Clauses in at least three ways: its express exemptions for

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[27] The government's briefs in that case emphasized that the exemption had no practical effect because "no windfall profit would accrue to the producers of oil located within certain geographically-defined" exempt areas. Reply Brief for the United States at 3, *United States v. Ptasynski*, No. 82-1066 (U.S. filed Apr. 20, 1983); *see also id.* at 4 ("Congress has taxed such [windfall] profits in every place where it has determined them to exist."); S. Rep. No. 96-394, at 7 (1979) ("The committee does not believe that the logic of a windfall profit tax extends to oil . . . from which there can be no 'windfall.'").

(1) Alaska and Hawaii, (2) a substantial part of the Columbia River, and (3) inland waterways.

Congress did not (and could not) find that port use was non-existent in Alaska and Hawaii. To the contrary, Congress premised the exemption for those States on the notion that domestic ship carriage imposes *more* burdens on ports located there.[28] Yet the favoritism for the ports of those States creates disuniformity and naked preferences.

The Harbor Maintenance Tax also discriminates in favor of Washington and Oregon by excluding a 47-mile stretch of the Columbia River from the Harbor Maintenance Tax.[29] *See* 26 U.S.C. § 4462(a)(2)(C) (defining "port" to include "the channels of the Columbia River in the States of Oregon and Washington only up to the downstream side of the Bonneville lock and dam").

The Columbia River exception was not in the bill passed by the House, nor was it in the original Senate bill. Instead, it was added by the Senate Finance Committee. *See* S. Rep. No. 99-228, at 7. Notably, the Chairman of that committee (Senator Packwood) and a main proponent of the bill on that committee (Senator Hatfield) were from Oregon, the State (with Washington) that directly bene-

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[28] Even if it were constitutional to equalize any disproportionate burden on Alaska and Hawaii flowing from greater port use (in this case it is not), the statute's *complete* exemption from the tax of domestic commerce in those States goes far beyond what even that theory can justify. Moreover, Congress could presumably redress any perceived inequalities in effects by diverting a greater proportion of HMT proceeds or other general revenues to those States. Whereas the Constitution insists on uniformity with respect to the levying of taxes, it does not insist on uniformity with respect to expenditures.

[29] These ports are also exempt from the Inland Waterways Fuel Tax ("IWFT"). *See* 33 U.S.C. § 1804(8) (excluding certain inland waterway portions of the Columbia River from the IWFT). The IWFT is imposed on a per-gallon basis on "fuel [used] in a vessel in commercial waterway transportation." 26 U.S.C. § 4042(a). "Commercial waterway transportation" occurs only on inland or intracoastal waterways as defined in 33 U.S.C. § 1804 (identifying 27 rivers as inland and intracoastal waterways).

fits from the preference conferred on ports on the Columbia River. The exempted ports are no different from the others covered by the Tax, and the legislative history gives no reason purporting to justify this apparent log-rolling exemption favoring two States over all others. The nakedness of the preference is amplified by the fact that, although these Columbia River ports are exempted from having to pay the tax, they nevertheless receive HMT Trust Fund monies. For example, in 1991, Congress appropriated $8 million from the Harbor Maintenance Trust Fund in part to maintain that very stretch of river.[30]

Finally, the Harbor Maintenance Tax also discriminates by exempting cargo traveling on inland waterways from paying the tax. Although some of the exempted cargo is subject to the IWFT, *see* note 29, *supra*, deep-draft (*i.e.*, ocean-going) vessels escape *both* taxes when unloading cargo at ports on inland waterways. *See* 26 U.S.C. § 4042(c)(1)("The [IWFT] shall not apply with respect to any vessel designed primarily for use on the high seas which has a draft of more than 12 feet."). That loophole allows certain import shipments to escape both taxes by unloading at a Customs port of entry along an inland waterway, thus discriminating in favor of states with such ports.

C. The Federal Circuit's Analysis Ignores The Constitutional Text

There is nothing ambiguous or indefinite about the words, "No Preference shall be given . . . to the Ports of one State over those of another." U.S. Const. art. I, § 9, cl. 6. Yet, rather than applying that plain language, the Federal Circuit instead announced a rule supposedly derived from this Court's cases that "a statute with explicit

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[30] Energy and Water Development Appropriations Act, 1992, Pub. L. No. 102-104, 105 Stat. 510, 517 (1991) (appropriating funds "to maintain navigation access to and berthing areas at all currently operating public and private commercial dock facilities associated with the Federal navigation project on the Columbia and Snake Rivers, from Bonneville Dam to Lewiston, Idaho").

exemptions of states to *prevent* disparate effects" does not violate the Clause. Pet. App. 15a.

It is true that this Court's cases have never had to confront the types of express preferences given to the ports of certain states. Until enactment of the Harbor Maintenance Tax, in which Congress also enacted a blatantly unconstitutional tax on exports, Congress had never been so brazen as to enact naked preferences "to the Ports of one State over those of another." Consequently, this Court's Port Preference Clause cases have confronted the quite different problem of determining whether a statute that has incidental effects benefiting a particular port (or even those ports of a state) runs afoul of the clause. *See, e.g., City of Milwaukee v. Yeutter*, 877 F.2d 540, 545 (7th Cir. 1999) (Easterbrook, J.) (collecting cases for proposition that "[d]isparate consequences of neutral rules do not violate the Port Preference Clause").[31] Because violations of the Port Preference and Uniformity Clauses are much starker with the Harbor Maintenance Tax than with those other statutes, this Court should reverse the decision below.

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[31] *Wheeling*, 59 U.S. (18 How.) at 433-36 (bridge that interdicts access to an upriver port does not violate the Clause, remarking, *id.* at 435, that the Clause "seems to import a prohibition against some positive legislation by congress [preferring certain ports], and not against any incidental advantages that might possibly result from the legislation of congress upon other subjects"); *South Carolina v. Georgia*, 93 U.S. 4, 12-13 (1876) (similar); *Armour Packing*, 209 U.S. at 80 (rules changing rail rates and diverting traffic from some ports do not violate the Clause); *Louisiana Pub. Serv. Comm'n*, 284 U.S. at 131 (rail rate allowance for crossing the Mississippi in Louisiana does not violate the Clause: "Congress . . . causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports"); *Alabama Great Southern R.R. v. United States*, 340 U.S. 216, 229 (1951). *See also City of Houston v. FAA*, 679 F.2d 1184, 1196-98 (5th Cir. 1982) (summarizing these cases).

D. The Federal Circuit's Port Preference Clause Test Is Contrary To The Test Announced In The Fifth, Seventh, And D.C. Circuits

In addition to misapplying this Court's cases, the Federal Circuit added a restrictive gloss on the Port Preference Clause that departs from the standard announced and applied in three other circuits. The court below held that the Clause "prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports." Pet. App. 16a.

By contrast, the Fifth Circuit, in language the Federal Circuit quoted but clearly misunderstood, has held that the Clause permits governmental actions so long as "they occur (i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional government preference." *City of Houston*, 679 F.2d at 1197-98. The Fifth Circuit there held that the Clause negates express preferences but not preferences containing incidental effects. *See id.* (upholding FAA rule restricting nonstop flights to airports within 1,000 miles of Reagan National Airport). Likewise, the Federal Circuit's decision conflicts with the Seventh Circuit's construction of the Clause. In *City of Milwaukee v. Yeutter*, the court explained that "[f]or two hundred years courts have understood that only explicit discrimination violates the Port Preference Clause." 877 F.2d at 546. The court reaffirmed that express preferences violate the Constitution, but rejected the challenge there because the statute did not contain such preferences. In both cases, the courts treated the Port Preference Clause as a command prohibiting express preferences in favor of the ports of certain states, and not a provision to be ignored.

As Judge Silberman explained for the D.C. Circuit, the view that the Clause is "almost a historical nullity" is unsound; rather, the better view is that "it simply has not yet been seriously impinged upon." *Kansas v. United*

States, 16 F.3d 436, 439 (D.C. Cir. 1994); *see Downes*, 182 U.S. at 255 (finding that Clause would have been violated if it applied to Puerto Rico Territory). Because of the exclusive jurisdiction conferred on the Federal Circuit, no other circuit will ever have the opportunity to pass on the preferences afforded by Congress in the Harbor Maintenance Tax. Yet, as the D.C. Circuit unequivocally explained, "[t]he Port Preference Clause, as reflected in the records of the Philadelphia Convention, was designed to prevent the federal government from providing any regulatory benefits to ports in one state over another." *Kansas*, 16 F.3d at 439. Because that is exactly what Congress did with the Harbor Maintenance Tax, there is no way to reconcile the approach taken by the Federal Circuit below with the construction of the Clause given by the Fifth, Seventh, and D.C. Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 03-1044

THOMSON MULTIMEDIA INC.
(NOW KNOWN AS THOMSON INC.),
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

No. 03-1137

CF INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

[Decided Aug. 18, 2003]

Before NEWMAN, MICHEL, and RADER, Circuit Judges.

MICHEL, Circuit Judge.

Plaintiff-appellant Thomson Multimedia Inc. ("Thomson") appeals from the United States Court of International Trade's grant of summary judgment in favor of the United States. *Thomson Multimedia Inc. v. United States*, 219 F.Supp.2d 1322 (Ct. Int'l Trade 2002). The court granted summary judgment because it held that the Harbor Maintenance Tax ("HMT""), 26 U.S.C. §§ 4461-4462 (2000), as applied to imports, was constitutional in

light of both the Uniformity, Art. I, § 8, cl. 1, and Port Preference, Art. I, § 9, cl. 8, Clauses of the U.S. Constitution. Plaintiff-appellant CF Industries, Inc. ("CF Industries") appeals from a separate grant of summary judgment in favor of the United States by the Court of International Trade. The trial court granted summary judgment in that case because, based upon its interpretation of the Uniformity and Port Preference Clauses in *Thomson*, the HMT as applied to domestic unloadings was also constitutional. Given their interdependency, we address these two, separate appeals in a single decision. Because we hold that the HMT as applied to imports and domestic unloadings is a user fee rather than a tax and because we hold that the various exemptions in the HMT do not violate the Port Preference Clause of the Constitution, we affirm the Court of International Trade's decisions in both cases.

BACKGROUND

The HMT was enacted as part of the Water Resources Development Act of 1986 ("WRDA"), Pub.L. 99-662, 100 Stat. 4082. Congress intended the HMT to help finance the general maintenance and improvement of ports in the United States. S.Rep. No. 99-126, at 9-10 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6640-47. The HMT imposes an *ad valorem* charge of 0.125 percent of the value of the commercial cargo involved in "any port use." 26 U.S.C. § 4461(b). The statute defines the term "port" as "any channel or harbor (or component thereof) in the United States, which . . . (i) is not an inland waterway, and (ii) is open to public navigation." *Id.* § 4462(a)(2)(A); *see also id.* § 4462(a)(2)(B)-(C). The statute defines "port use" as, in the case of imports and domestic shipments, "the unloading of commercial cargo from, a commercial vessel at a port." *Id.* § 4462(a)(1)(B); *see also id.* § 4461(c)(2). The statute sorts commercial cargo into three categories: (1) "cargo entering the United States" (i.e., imports); (2) "cargo to be exported from the United

States" (i.e., exports); and (3) "any other case" (i.e., domestic cargo). *Id.* § 4461(c)(1). A separate statute establishes the Harbor Maintenance Trust Fund ("HMT Fund") for revenue raised by the HMT to be expended on the operation and maintenance of channels and harbors. *Id.* § 9505.

Importantly for these appeals, the HMT contains several implicit and explicit exemptions. First, the statute effectively exempts "inland waterway[s]" from HMT liability by excluding them from the statute's definition of "port." 26 U.S.C. § 4462(a)(2)(A)(ii). Second, the statute effectively exempts from the HMT part of the Columbia River by including channels of that river "only up to the downstream side of Bonneville lock and dam." *Id.* § 4462(a)(2)(C). Third, the statute explicitly exempts from the HMT domestic cargo (excluding crude oil) either unloaded in Hawaii, Alaska, or U.S. possessions or unloaded in the continental United States and shipped from Alaska, Hawaii, or a U.S. possession. *Id.* § 4462(b).

In the trial court, the two plaintiff-appellants challenged the HMT as applied to domestic unloadings and imports. Thomson is an importer of consumer electronic products and pays over $1 million per year in HMTs. Thomson argued the HMT is unconstitutional because: (1) the unconstitutional export provision[1] is not severable from the rest of the statute; (2) it violates the Uniformity Clause of the Constitution because it causes a geographical bias by exempting Alaska and Hawaii, a 47.5 mile segment of the Columbia River, and inland waterways; and (3) it violates the Port Preference Clause of the Constitution by exempting Alaska and Hawaii, a 47.5 mile segment of the Columbia River, and inland waterways.

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[1] In *United States v. United States Shoe Corp.*, 523 U.S. 360, 370, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998), the Supreme Court held that the HMT as applied to exports was unconstitutional because it violated the Export Clause of the Constitution, Art. I, § 9, cl. 5.

CF Industries is a domestic shipper of phosphate fertilizer that paid a total of $323,416 in HMTs from December 1999 to June 2002. CF Industries argues only that the HMT as applied to domestic unloadings violates both the Uniformity and Port Preference Clauses of the Constitution because it exempts domestic unloadings of cargo in Alaska and Hawaii.

The Court of International Trade dealt with these issues in its *Thomson* opinion granting summary judgment in favor of the government. 219 F.Supp.2d at 1322-32. First, it held that the import clause was severable from the HMT on exports "because the Federal Circuit has 'specifically held that the unconstitutional export provision in the HMT is severable from the remainder of the statute.'" *Id.* at 1324 (quoting *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed.Cir.2000)); *see also Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1358 (Fed.Cir.2000); *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361 (Fed.Cir.2000). Second, the trial court held the HMT as applied to imports was a "tax" rather than a "user fee" based upon its decision in *United States Shoe Corp. v. United States*, 907 F.Supp. 408 (Ct. Int'l Trade 1995) (holding the HMT as applied to exports was a tax because it did not satisfy the second and third prongs of the three-prong test established in *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978)). Third, the trial court interpreted both the Uniformity and Port Preference Clauses of the Constitution as prohibiting only geographic (or port) distinctions effectively designed to promote state versus state or region versus region favoritism or discrimination. *Thomson*, 219 F.Supp.2d at 1326, 1330-31. As such, the court held the exemptions at issue did not violate either clause because: (1) the Alaska and Hawaii exemptions were narrowly tailored attempts by Congress to address the geographically isolated problem of those two places being heavily dependent on ocean transportation for domestic consumption; (2) the Columbia River "exemption"

was more likely an oversight or a simple geographic distinction between "inland waterways" and "ports" and there was no evidence of actual benefit to the "exempted" ports; (3) the exemption of the inland waterway ports did not indicate any state or regional discrimination. Subsequently, the Court of International Trade applied these holdings to CF Industries and granted summary judgment in favor of the government. *CF Indus., Inc. v. United States*, No. 02-00281, 2002 Ct. Intl. Trade LEXIS 138, at *2 (Ct. Int'l Trade Nov. 26, 2002).

On appeal, Thomson challenges each holding of the trial court (except for the holding that the HMT was a tax) and CF Industries challenges the court's holding that the Alaska and Hawaii domestic exemptions do not violate the Uniformity or Port Preference Clause. The government supports the trial court's rulings and also argues that the HMT is a user fee rather than a tax. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the Court of International Trade's grant of summary judgment and conclusion of the constitutionality of the HMT *de novo*. *Princess*, 201 F.3d at 1357. We also review the interpretation of a statute, including questions of severability, *de novo*. *Id.*

I

The trial court held that the import and domestic unloading portions of the HMT were severable from the unconstitutional export provision. *Thomson*, 219 F.Supp.2d at 1324 (citing *Amoco Oil*, 234 F.3d at 1377; *Princess*, 201 F.3d at 1358; *Carnival*, 200 F.3d at 1361). Thomson argues that the prior decisions holding the HMT severable "should not be treated as binding precedent" because: "The panel[s] in *Princess* [201 F.3d 1352] and *Carnival* [200 F.3d 1361] relied upon an observation that the World Trade Organization ("WTO") had not taken final action on whether the post-United States Shoe HMT on imports

and not exports violated international agreements." Because the executive branch had already conceded in the WTO that there was a violation, Thomson argues, the basis for the panels' decisions was wrong. We disagree with Thomson and hold that our decisions in *Princess* and *Carnival* are binding precedent on this panel.

Contrary to Thomson's argument, our prior decisions did not turn on the WTO's position on the HMT as applied to imports. Those decisions relied, instead, on the presence of a severability clause in the WRDA (of which the HMT was a part) and the fact that "the legislative history of the statute does not show that Congress would not have imposed the [HMT] without applying it to exports." *Carnival*, 200 F.3d at 1366-67. Indeed, in dismissing the specific argument that Congress did not intend to make the application of the HMT to exports severable from the HMT as applied to imports because of possible conflicts, this court first noted that, in a different case, the Court of International Trade had found the legislative history on point "'insufficient to rebut the strong presumption of severability.'" *Id.* at 1369 (citing *Amoco Oil Co. v. United States*, 63 F.Supp.2d 1332, 1337 (Ct. Int'l Trade 1999)). Further, the court noted that if the WTO were to take final formal action against the import portion of the HMT and "the result [were] to create serious problems, either the executive or the legislative branch presumably will take appropriate action." *Id.* This latter statement makes evident the court's view that subsequent action by the WTO is irrelevant to the question of whether Congress would have enacted only the import provision, because the action by the WTO could only take place after Congress enacted the provision. In short, we are bound by our precedent in *Carnival* to hold that the export provision of the HMT is severable from the remaining provisions of the statute.

II

The trial court held that the HMT as to imports and domestic unloadings is a "tax" rather than a "user fee."[2] *Thomson*, 219 F.Supp.2d at 1325. The court applied the three-prong test prescribed by the Supreme Court in *Massachusetts v. United States*, 435 U.S. 444, 464, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978): "(1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred." *Thomson*, 219 F.Supp.2d at 1325 (citing *Massachusetts*, 435 U.S. at 464, 98 S.Ct. 1153). The trial court held that the HMT, as applied to imports and domestic unloadings, failed the second and third prongs, relying entirely on the court's prior analysis of the HMT as applied to exports in *United States Shoe Corp. v. United States*, 907 F.Supp. 408 (Ct. Int'l Trade 1995), *aff'd*, 114 F.3d 1564, 1574 (Fed.Cir.1997), *aff'd*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998). *Thomson*, 219 F.Supp.2d at 1325. In that case the trial court held that the HMT failed the second prong because low-value bulk importers use ports more, but pay less than high-value non-bulk importers and failed the third prong because the HMT is used to fund projects yet to be commenced, rather than repay the government for services rendered. *United States Shoe*, 907 F.Supp. at 415, 415 n. 2.

On appeal the government argues that the trial court's reliance on *United States Shoe* was misplaced, as the standard and the analysis involving the Export Clause of

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[2] This is a potentially dispositive point on the Uniformity Clause issue because if the HMT is held to be a user fee, the Uniformity Clause cannot apply, as it applies only to "duties, imposts, and excises." U.S. Const. Art. I, § 8, cl. 1.

the Constitution is far stricter than that involved in the Uniformity Clause.[3] Because of the different clauses at issue, and, consequently, the different standards applicable, the government argues that the HMT as applied to imports and domestic unloadings is a "user fee." We agree.

In *United States Shoe* this court applied the *Massachusetts* test to hold "that the HMT [as applied to exports] is not based on a fair approximation of use and, as such, is not a permissible user fee." *United States Shoe*, 114 F.3d at 1574. In doing so, this court distinguished *United States v. Sperry Corp.*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989) (holding that a fee of 1.5% of all awards recovered from the Iran-United States Claims Tribunal was a valid user fee), based upon the fact that *Sperry* did not deal with a challenge under the Export Clause. *United States Shoe*, 114 F.3d at 1572-73. Indeed, this court specifically noted that the Supreme Court viewed the inquiry under the Export Clause as very strict. *Id.* at 1573 (citing *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 851-52, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) ("The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.")).

The importance of the strictness of the Export Clause inquiry was confirmed by the Supreme Court's affirmance in *United States Shoe*. In affirming that decision, the court noted "*IBM* plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations

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[3] Although the appellee in this appeal, the government is permitted to make this argument as an alternate basis for affirmance because the argument was raised below and is supported by the record. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.").

on governmental taxing authority." *United States Shoe*, 523 U.S. at 368, 118 S.Ct. 1290. The Supreme Court distinguished three other Supreme Court cases upholding *ad valorem* charges as user fees solely because "[t]hose decisions involved constitutional provisions other than the Export Clause." *Id.* In addition, the Supreme Court did not even apply the *Massachusetts* test and instead relied on a different, more stringent standard specific to the Export Clause. *Id.* at 369-70, 118 S.Ct. 1290 (applying the test announced in *Pace v. Burgess*, 92 U.S. 372, 375-76, 23 L.Ed. 657 (1872)). In sum, the Supreme Court's opinion not only makes clear the importance of the strictness of the Export Clause to its decision, it implicitly rejects this court's analysis under the *Massachusetts* test.

Now we must analyze the HMT, as applied to imports and domestic shipping under the more flexible *Massachusetts* test. We first note that although many of the surface-level indicia[4] point to the HMT as being a tax, Congress seemingly intended the HMT to be a user fee. *United States Shoe*, 114 F.3d at 1578-80 (Mayer, J., dissenting) (citing and quoting multiple sources of legislative history, *e.g.*, S.Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644 ("The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels.")).

The first prong of the *Massachusetts* test asks whether the charge unfairly discriminates against the constitutionally-protected interest implicated by the charge. 435 U.S. at 464, 98 S.Ct. 1153. Neither appellant makes any argument under this prong, but we address it briefly. In this case, the only possible constitutional interests implicated are those embodied in the Uniformity and Port

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[4] The HMT is codified in the Internal Revenue Code and refers to itself as a tax both in its title and in its body.

Preference Clauses. The charge itself, however, implicates neither – it is only the exemptions in the HMT that possibly implicate either clause. That being the case, we do not see how the charge could be viewed as discriminating against any constitutionally-protected interest associated with either clause.

The second prong asks whether the charge is a fair approximation of the importers' and domestic shippers' use of United States harbors and ports. *Id.* Appellants argue that the HMT as applied to imports and domestic unloadings "does not correlate reliably with the federal harbor services used or usable." *United States Shoe*, 523 U.S. at 369, 118 S.Ct. 1290. Appellants point us to the arguments embraced by this court in *United States Shoe*, where the appellant in that case argued:

> [T]he amount of the HMT has no relationship to the size or weight of the vessel or the necessary depth of the port required by the vessel. . . . [E]ven though the bulk cargo exporters generally require a larger vessel and a deeper port, and therefore "use" the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters. Moreover, a ship that docks but does not load or unload cargo is not required to pay a fee, even though that ship otherwise utilizes the port. Additionally, there is apparently no correlation between the amount of fees collected at a particular port and the expenditure of funds from the Trust Fund to maintain that particular port. . . . Finally, it is not consistent with a true user fee that so many users are exempted, such as those carrying bunker fuel, ship's stores, equipment necessary for the operation of the vessel and fish and other aquatic animal life not previously landed on shore, since ships carrying these products use the port facilities to the same extent as ships carrying products subject to the HMT.

114 F.3d at 1572 (citations omitted). As noted above, because the cases show that *ad valorem* charges are generally upheld in contexts outside of the Export Clause and because this court's prior analysis depended upon the strictness of the inquiry in the Export Clause context, we disagree with appellants, and hold that the HMT as applied to imports and domestic unloadings is a fair approximation of the use of the ports.

To satisfy the second prong of the *Massachusetts* test, a user fee must only "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 717, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). User fees need not "be precisely calibrated to the use that a party makes of government services." *Sperry*, 493 U.S. at 60, 110 S.Ct. 387. Indeed, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system." *Id.* at 61, 110 S.Ct. 387. Nonetheless, the Supreme Court has "declined to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation for [the corresponding use].'" *Id.* (quoting *Massachusetts*, 435 U.S. at 468 n.8, 98 S.Ct. 1153). In addition, the Supreme Court has considered the administrative costs associated with a corresponding increase in the closeness of the approximation of use. *Massachusetts*, 435 U.S. at 466, 98 S.Ct. 1153; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546-47, 70 S.Ct. 806, 94 L.Ed. 1053 (1950) ("Each additional factor adds to administrative burdens of enforcement. . . . We have recognized that such burdens may be sufficient to justify . . . ignoring [key factors], although the result may be a tax which on its face appears to bear with unequal weight upon different carriers." (citations omitted)).

Applying those standards, we hold that the HMT's *ad valorem* charge is based upon a fair approximation of the

cost of the benefits provided for port users. Although imperfect in its application, Congress rationally determined that value was "the only acceptable basis on which to impose such charges. This national uniform basis minimizes any possible disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R.Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710. Congress carefully considered the basis for the charge, hearing much testimony in favor of an *ad valorem* charge over a port-specific fee or a flat tonnage fee. *See, e.g.*, Senate Comm. on Finance, Hearings 99-410, 99th Cong., 1st Sess. 47 (Sept. 10, 1985); House Comm. on Ways and Means, Hearing 99-36, 99th Cong., 1st Sess. 59 (Sept. 5, 1985). Congress also viewed the *ad valorem* basis as one that would minimize administrative costs associated with collection. *See* H.R.Rep. No. 99-228, at 10, *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714. Further, the imperfections urged to be fatal here are no more severe than those attached to other charges that the Supreme Court has upheld in other cases. *Sperry*, 493 U.S. at 59-64, 110 S.Ct. 387 (upholding as a user fee a charge of 1.5% of awards recovered from the Iran-United States Claims Tribunal); *Massachusetts*, 435 U.S. at 467-70, 98 S.Ct. 1153 (upholding as a user fee an annual fee (varying depending on type and weight of the aircraft) on all civil aircraft that fly in the navigable U.S. airspace even though "not all aircraft make equal use of the federal navigational facilities or of the airports"); *Evansville*, 405 U.S. at 717-20, 92 S.Ct. 1349 (upholding a user fee of one dollar per commercial airline passenger to pay for airport construction and maintenance even though the "measures exempt[ed] in whole or part a majority of the actual number of persons who use facilities of the airports involved" because those exemptions were not "wholly unreasonable"); *Greyhound Lines*, 339 U.S. at 545, 70 S.Ct. 806 (upholding as a user fee a highway tax of "2% upon the fair market value of motor vehicles used in interstate commerce"); *see also Alamo Rent-A-Car, Inc. v. City of*

Palm Springs, 955 F.2d 30, 30-31 (9th Cir.1992) (upholding as a user fee a charge of 7% of a car rental company's gross receipts from car rental customers it picked up at an airport); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516, 518-21 (11th Cir.1990) (upholding as a user fee a charge of 10% of a car rental company's gross receipts from car rental customers it picked up at an airport).

Turning now to the third prong, we hold that the HMT is not excessive in relation to the expenditures by the government. *See Massachusetts*, 435 U.S. at 444, 98 S.Ct. 1153. The trial court held that this prong was not met solely because the HMT is used to fund future projects and not to repay the government for services rendered. *Thomson*, 219 F.Supp.2d at 1325. This failing, however, is not fatal to the HMT's status as a user fee. The HMT's (and the corresponding trust fund's) purpose is to provide for the operation and maintenance of channels and harbors. This is certainly a long-term project and must have been viewed as such. Given the nature of the problem the HMT addresses, it seems inconsequential and indeed unavoidable that the HMT pays for future programs. *Alamo*, 906 F.2d at 522 ("[G]iven the long term nature of maintaining and developing an airport, it was appropriate . . . to factor in future development plans when setting user fees."); *see also Massachusetts*, 435 U.S. at 470 n.25, 98 S.Ct. 1153 ("[A] surplus of revenue over outlays in any one year can be offset against actual deficits in past years and perhaps against projected deficits of future years."). Further, no HMT funds can be used for any purpose other than the operation and maintenance of channels and harbors (or related costs), meaning the funds will always be used to continue the benefits of the services previously provided. 26 U.S.C. § 9505. Indeed, in upholding other charges as user fees, the Supreme Court has noted that the fees were deposited in a dedicated trust fund to cover only the expense of government facilities or services. *See, e.g., Morgan's La. & T.R. & S.S. Co. v. Bd. of Health*, 118

U.S. 455, 461, 6 S.Ct. 1114, 30 L.Ed. 237 (1886); *Head Money Cases*, 112 U.S. 580, 596, 5 S.Ct. 247, 28 L.Ed. 798 (1884).

In sum, because the HMT as applied to imports and domestic unloadings is a valid user fee and not a tax, we hold that it is outside the scope of the Uniformity Clause's prohibitions.

III

The trial court held that the Port Preference Clause prohibits only deliberate discrimination against the ports in one or more states and in favor of others. *Thomson*, 219 F.Supp.2d at 1330-31. Appellants argue the trial court erred in its interpretation, and that the Clause prohibits any positive legislation intended to produce a direct privilege or preference favoring the ports of any particular state over those of another. That is the case here, appellants argue, because the HMT gives preference to the ports of Alaska and Hawaii by exempting domestic unloadings in those two states from HMT liability.[5] We disagree and hold that the trial court properly interpreted and applied the Port Preference Clause.

The Port Preference Clause reads: "No preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const. Art. I, § 9, cl. 6. The Clause was proposed by Maryland's delegate to the Constitutional Convention, Luther Martin, who worried that Congress "might favor the ports of particular States, by requiring vessels to or from other States to enter & clear thereat, as vessels belonging or bound to

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[5] In its briefing Thomson argues the Port Preference Clause is violated by the exemptions of a 47.5 mile segment of the Columbia River and inland waterways. However, as neither of those exemptions gives express preference to the ports of one state over another, we reject those arguments out of hand. *See Penn. v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 435, 18 How. 421, 15 L.Ed. 435 (1856). Appellants make no argument addressing the exemption for ports in the United States' possessions.

Baltimore, to enter & clear at Norfolk." 2 Max Farrand, *The Records of the Federal Convention of 1787*, 417 (1966). Martin later opposed the Clause because it dealt only with express preferences and left states to bear the effects of other rules. Luther Martin, *Genuine Information* (1788), *reprinted in* Philip B. Kurland & Ralph Lerner, 3 *The Founders' Constitution* 372 (1987). In interpreting the clause, the Supreme Court has stated, "what is forbidden is not discrimination between individual ports within the same or different states, but discrimination between states." *Penn. v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 435, 18 How. 421, 15 L.Ed. 435 (1855). That decision and other decisions interpreting the Clause make clear only that the Clause does not prohibit a facially nondiscriminatory law that has incidental, disparate effects on ports of one or more states. *E.g.*, *Wheeling*, 18 (How.) 421, 59 U.S. at 433-36; *Armour Packing Co. v. United States*, 209 U.S. 56, 80, 28 S.Ct. 428, 52 L.Ed. 681 (1908); *La. Pub. Serv. Comm'n v. Tex. & New Orleans R.R.*, 284 U.S. 125, 131, 52 S.Ct. 74, 76 L.Ed. 201 (1931); *City of Houston v. Fed. Aviation Admin.*, 679 F.2d 1184, 1197-98 (5th Cir.1982); *City of Milwaukee v. Yeutter*, 877 F.2d 540, 546-47 (7th Cir.1989).

Appellants argue from this case law that the Clause prohibits all express preferences for the ports of one state over the ports of another. Their logic is flawed. The above-cited decisions support only the proposition that a facially nondiscriminatory statute that causes disparate effects does not violate the Clause. This is simply not an issue in this case. The cases do not support the proposition that a statute with explicit exemptions of states to *prevent* disparate effects violates the Clause. These are two entirely different issues.

We are directed to no case holding directly supporting the trial court's interpretation of the clause either. One somewhat instructive statement, however, comes from the United States Court of Appeals for the Fifth Circuit:

> Government actions do not violate the Clause even if they result in some detriment to the port of a state, where they occur (i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more *as a result of the accident of geography* than from an intentional government preference.

Houston, 679 F.2d at 1197 (emphasis added). Although the holding in *Houston* does not address the issue in this appeal, we see a strong implication, particularly from prong (ii) of the announced test, that geography can play a role so long as it is not indicative of an intentional preference. In addition, a recent statement by Justice Thomas offers some support, although it is quite clearly not a holding of the Supreme Court. *United States v. Lopez*, 514 U.S. 549, 587, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Thomas, J., concurring) ("Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the [Port Preference] Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports."). The statement of the Fifth Circuit and Justice Thomas's views comport with the historic purpose for including the clause in the Constitution: "[It] gave small states [e.g., Maryland] protection against deliberate discrimination against them by other, more powerful states [e.g., Virginia]." *Houston*, 679 F.2d at 1198. Therefore, we hold that the better view of the Port Preference Clause is that it prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports.

That being the case, we hold that the exemptions at issue here are not the sort of preference prohibited by the Clause. Instead, Congress crafted a narrow exemption to alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic

shipping. As a starting point, we note that there was ample evidence in the legislative history supporting Congress' view that the vast geographical separation of the exempted states from the "lower forty-eight states" was a complication that made Alaska and Hawaii heavily dependent on domestic shipping (as opposed to other forms of transportation of goods). *E.g., Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing on H.R. 6 Before the House Committee on Ways and Means*, 99th Cong. 30 (1985) ("Virtually everything in and out of [Hawaii] must travel by ship. . . . A port user fee, therefore, would be levied on over 80% of all the states goods and materials."); 132 Cong. Rec. S2739-02, S2825 (daily ed. Mar. 14, 1986) ("Surface transportation in Alaska is almost exclusively waterborne. For much of Alaska waterborne shipping is the only way to get materials to communities where they will be used."). To solve this problem, the exemption then, only applies to domestic unloadings, not imports or exports. 26 U.S.C. § 4462(b). Thus, no advantage arises for international shipping to and from ports of these states, because there is no indication that Alaska and Hawaii are more dependent on international shipping than any other states. In addition, the exemption also applies to "possessions" of the United States, *id.*, such as Puerto Rico or Guam which are also geographically isolated, confirming that the exemption was designed to minimize disadvantages inherent in applying the HMT to domestic cargo of distant ports because of their geographic isolation – namely greatly increased dependence of those entities on domestic shipping. Lastly, the exemption also applies to ports receiving shipments from Alaska and Hawaii, meaning that there are exempted unloadings (potentially) in the ports of all states. *Id.* In short, it is clear that the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief

from the disparate effects the HMT would have had on the shipping-dependent states and possessions.

Second, and apart from our determination that Congress did not intend an illicit preference to be given to Alaska or Hawaii, we find it difficult to discern an actual preference for those ports. It is true that domestic shipments – except for crude oil shipments out of Alaska – that arrive in the ports of those states will not be subject to HMT liability. *Id.* It is also true that the ports of both states are geographically isolated and as such are more heavily dependent on domestic shipping to receive goods. This isolation, however, also makes it difficult to imagine domestic shippers deliberately routing cargo to a port in Alaska or Hawaii as an intermediate stop (say, on a shipment from Long Beach to Seattle) in order to avoid HMT liability. In that respect, it is hard to view this exemption as one that will channel commerce through the ports of one state to the detriment of the ports in other states. In addition, the express exemption also applies to domestic cargo shipped from ports in Alaska and Hawaii and therefore exempts certain domestic unloadings in ports of other states from liability. Thus, the exemption applies not only in the ports of Alaska and Hawaii, but also in the ports of any state that receives shipments from the ports of Alaska or Hawaii. In those circumstances, the ports of other states are given the same advantage (no HMT liability) as the ports in Alaska or Hawaii.

Lastly, we note that the exemptions were expressed using two states' names does not in itself indicate that Congress intended or effected a preference to the ports of those states. Congress merely used the convenience of naming those states, rather than devising a formulation that would somehow include all states and possessions within a certain class – i.e., those that are geographically distant from the lower forty-eight states and that lack a plausible alternative to ocean shipping. In essence, naming the states and possessions as exempted merely served

as a proxy for a complex formula defining excessive isolation causing a greater dependency on domestic cargo than that experienced by other coastal states.

In sum, we conclude that the exemption of HMT liability for domestic unloadings at the ports in Alaska and Hawaii (and U.S. possessions) and at any other port in the U.S. when the shipment is from a port in Alaska and Hawaii (or U.S. possession), does not give a preference to the ports of Alaska and Hawaii that violates the prohibition of the Port Preference Clause.

CONCLUSION

In conclusion, we affirm the trial court's decisions in both appeals because we hold that the HMT as applied to imports and domestic unloadings is not a tax but a user fee making the Uniformity Clause inapplicable, and because we hold that the various exemptions in the HMT do not violate the Port Preference Clause of the Constitution.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 95-03-00277-S

THOMSON MULTIMEDIA INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

[Decided Aug. 21, 2002]

OPINION

RESTANI, Judge.

This matter is before the court on Plaintiff's motion and Defendant's cross-motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiff Thomson Multimedia Inc. ("Thomson") brought action against Defendant, the United States Customs Service ("Customs" or the "government"), to recover the Harbor Maintenance Tax ("HMT") collected on its electronics imports since 1992. Thomson argues that the HMT on imports is unconstitutional because: (1) the HMT on imports is not severable from the HMT on exports found to be unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998); (2) the HMT on imports violates the Uniformity Clause, U.S. Const. art. I, § 8, cl. 1; and (3) the HMT on imports violates the Port Preference Clause, U.S. Const. art. I, § 9, cl. 6.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i), the court's residual jurisdiction provision. *See Thomson Consumer Electronics, Inc. v. United States*, 247 F.3d 1210 (Fed.Cir.2001). Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, shows no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. USCIT R. 56(c).

BACKGROUND

The HMT was enacted as part of the comprehensive Water Resources Development Act of 1986, Pub.L. 99-662, 100 Stat. 4082 ("WRDA"), and is specifically contained in the Harbor Maintenance Revenue Act of 1986, Pub.L. 99-662, 100 Stat. 4266. 26 U.S.C. §§ 4461-62 (1994). The HMT imposes an *ad valorem* charge of 0.125 percent of the value of the commercial cargo involved in any port use of federally maintained navigable waterways, 26 U.S.C. § 4461(b). The term "port" is defined as "any channel or harbor (or component thereof) in the United States, which . . . (i) is not an inland waterway, and (ii) is open to public navigation." 26 U.S.C. § 4462(a)(2)(A). The Harbor Maintenance Trust Fund ("HMT Fund") was established for revenue raised by the HMT to be expended on the operation and maintenance of channels and harbors. 26 U.S.C. § 9505.

The Inland Waterway Fuel Tax ("IWFT") is also a component of the WRDA and is contained in the Inland Waterways Revenue Act of 1978, Pub.L. 95-502, 92 Stat. 1696. The tax is imposed "on any liquid used during any calendar quarter by any person as fuel in a vessel in commercial waterway transportation." 26 U.S.C. § 4042(a) (1994). For the purpose of the IWFT, commercial waterway transportation only occurs on inland or intracoastal waterways, as defined in 33 U.S.C. § 1804

(1994).[1] *See* 26 U.S.C. § 4042(d)(1). The Inland Waterway Trust Fund ("IW Fund") was established for revenue raised by the IWFT to be expended on the inland and coastal waterways of the United States. 26 U.S.C. § 9506.

DISCUSSION

A. Severability

Thomson argues that the HMT on imports should be declared invalid because it is not severable from the unconstitutional HMT on exports. Thomson's claim fails because the Federal Circuit has "specifically held that the unconstitutional export provision in the HMT is severable from the remainder of the statute." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed.Cir.2000) *aff'ing* 23 CIT 613, 63 F.Supp.2d 1332 (1999) (citing *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1358 (Fed. Cir.2000); *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361 (Fed.Cir.2000)).

B. Uniformity Clause

The Uniformity Clause provides that, "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be

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[1] 33 U.S.C. § 1804 identifies 27 rivers as inland and intracoastal waterways for the purposes of the IWFT. The list of these waterways includes segments of the: (1) Alabama-Coosa Rivers, (2) Allegheny River, (3) Apalachicola-Chattahoochee and Flint Rivers, (4) Arkansas River (McClellan-Kerr Arkansas River Navigation System), (5) Atchafalaya River, (6) Atlantic Intracoastal Waterway, (7) Black Warrior-Tombigbee-Mobile Rivers, (8) Columbia River (Columbia-Snake Rivers Inland Waterways), (9) Cumberland River, (10) Green and Barren Rivers, (11) Gulf Intracoastal Waterway, (12) Illinois Waterway (Calumet-Sag Channel), (13) Kanawha River, (14) Kaskaskia River, (15) Kentucky River, (16) Lower Mississippi River, (17) Upper Mississippi River, (18) Missouri River, (19) Monongahela River, (20) Ohio River, (21) Ouachita-Black Rivers, (22) Pearl River, (23) Red River, (24) Tennessee River, (25) White River, (26) Willamette River, and the (27) Tennessee-Tombigbee Waterway.

uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. Thomson argues that, because the HMT provides exemptions for certain ports, Customs does not apply the tax uniformly and, therefore, the HMT is unconstitutional.

1. Tax v. User Fee

As an initial matter, the government argues that the HMT on imports is a user fee, not a tax, and therefore the Uniformity Clause cannot apply. A user fee is a charge designed as compensation for government-supplied services, facilities, or benefits. *See Pace v. Burgess*, 92 U.S. 372, 375, 2 Otto 372, 23 L.Ed. 657 (1875). In *U.S. Shoe*, the Court rejected the argument the HMT on exports is a user fee finding that "the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here." *U.S. Shoe*, 523 U.S. at 369, 118 S.Ct. 1290 (holding that the HMT on exports is a tax). Defendant argues that the Supreme Court's user fee analysis was limited to the export provision and, therefore, is not binding.

Assuming *arguendo* that the Court's holding in *U.S. Shoe* applies only to the export provision, this court has already determined that the HMT on the whole is a tax. *United States Shoe Corp. v. United States*, 19 CIT 1284, 907 F.Supp. 408 (1995) (analyzing the HMT under *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978)), *aff'd*, 114 F.3d 1564 (Fed. Cir. 1997). In *Massachusetts*, the Court looked at three factors to determine whether a charge is a user fee: (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. 435 U.S. at 467-70, 98 S.Ct. 1153.

In *U.S. Shoe*, this court found that the HMT failed the second and third prong of the Massachusetts Test. 19 CIT at 1292, 907 F.Supp. at 415. "First, the charge is not based upon some fair approximation of the cost of the benefits port users receive from harbor maintenance and development projects." *Id.* (reasoning that low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters, yet, the cost to the latter is greater than that to the former). "Second, the charge is excessive in relation to the cost to the government." *Id.*[2] (reasoning that the tax is used to fund projects yet to be commenced, rather than to repay the government for services rendered). This analysis applies equally to the HMT on imports and exports and the court finds no reason to reject it. The court finds the HMT is a tax in its entirety, as it is not a fair approximation of the cost of the benefits to importers and the charge is excessive in relation to the cost to the government.

2. Geographic Discrimination

The Supreme Court has never relied upon the Uniformity Clause to invalidate a statute. The clause was first addressed in the *Head Money Cases*, where a federal statute levied a charge against carriers for each foreign passenger brought into the United States by seaport, though no charge was levied for foreign passengers crossing over inland borders. *Edye v. Robertson*, 112 U.S. 580, 594, 5 S.Ct. 247, 28 L.Ed. 798 (1884). In upholding the tax, the Court found that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Id.* In *Knowlton v. Moore*, the Court again rejected a Uniformity Clause claim on grounds that the

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[2] In *U.S. Shoe Corp. v. United States*, 114 F.3d 1564 (Fed.Cir.1997), the Court affirmed this court's conclusion regarding the second prong of the Massachusetts Test. It found that, "the HMT is not based on a fair approximation of use and, as such, is not a permissible user fee." *Id.* at 1574.

clause merely limits "the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States." 178 U.S. 41, 108, 20 S.Ct. 747, 44 L.Ed. 969 (1900). There have been few subsequent challenges under the Uniformity Clause.

In the *Reg'l Rail Reorganization Act Cases*, the Supreme Court addressed a similar uniformity provision found in the Bankruptcy Clause, Article I, Section 8, Clause 4 of the Constitution.[3] 419 U.S. 102, 159, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). The Court held, "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." The Court extended this analysis to the Uniformity Clause in *U.S. v. Ptasynski*, 462 U.S. 74, 83 n.13, 103 S.Ct. 2239, 76 L.Ed.2d 427 (1983) ("Although the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uniformity Clause, we have looked to the interpretation of one Clause in determining the meaning of the other.").

In *Ptasynski*, the Court first laid out the essential test for determining the constitutionality under this clause. "Where Congress defines the subject of a tax in non-geographic terms, the Uniformity Clause is satisfied." *Id.* at 84, 103 S.Ct. 2239. The court went on explain that, even if Congress frames a tax in geographic terms, the court may only declare a tax invalid if it results in "actual geographic discrimination." *Id.* at 85, 103 S.Ct. 2239. This examination is undertaken with the understanding that "[t]he Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems." *Id.* at 84, 103 S.Ct. 2239. At issue in *Ptasynski* was a tax exemp-

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[3] "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

tion for Alaskan oil[4] contained in the Crude Oil Windfall Profit Tax Act of 1980, 26 U.S.C. §§ 4986-4998 (repealed). The Court concluded that the Alaska oil exemption reflected "[Congress'] considered judgment that unique climatic and geographic conditions require that oil produced from this exempt area be treated as a separate class of oil." *Id.* at 79, 103 S.Ct. 2239.

Under *Ptasynski*, this court reviews the HMT for *actual* geographic discrimination and gives considerable deference to Congress and its consideration of geographically isolated problems. The court will invalidate the HMT under the Uniformity Clause only where it finds that Congress' purpose was to promote regional favoritism or discrimination.[5]

a. Alaska and Hawaii Domestic Cargo Exemption

Thomson challenges the special rule for Alaska and Hawaii domestic cargo contained in the HMT.[6] Thomson

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[4] Exempt Alaskan oil is defined by 26 U.S.C. § 4994(e) as, any crude oil (other than Sadlerochit oil) which is produced "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System." *Id.* at 78, 103 S.Ct. 2239.

[5] Though Congressional deference is significant, it is not absolute. In *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901), the Court found if Puerto Rico were a part of the United States for the purpose of the Uniformity Clause, a tax on goods originating in Puerto Rico would be a violation of the clause.

[6] The HMT contains a special rule for merchandise transported to and from Alaska, Hawaii, and any possession of the United States, by which no tax is imposed on:

> (A) cargo loaded on a vessel in a port in the United States mainland for transportation to Alaska, Hawaii, or any possession of the United States for ultimate use or consumption in Alaska, Hawaii, or any possession of the United States,
>
> (B) cargo loaded on a vessel in Alaska, Hawaii, or any possession of the United States for transportation to the United States

argues that the rule is a geographic exemption that results is discrimination. Thomson is likely correct that the exemption for Alaska and Hawaii cargo is framed in geographic terms. Plaintiff, however, fails to show actual favoritism or discrimination. Under *Ptasynski*, the court must analyze the geographic exemption to determine whether, by enacting the exemption, Congress was attempting to address a geographically isolated problem.

As noted in *Amoco*, 63 F.Supp.2d at 1339 n.15, Congress included the Hawaii domestic cargo exemption in response to Congressional concern that Hawaii presented an isolated geographical problem.[7] The court finds that by providing an exemption for domestic cargo movement to and from Alaska and Hawaii, Congress was addressing a geographically unique problem in two states where domestic consumption is heavily dependent on ocean transportation. With Alaska and Hawaii's disproportionate dependence on ocean transportation for domestic consumption and transportation of merchandise to the remainder of the United States, Congress' exemption for the

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mainland, Alaska, Hawaii, or such a possession for ultimate use or consumption in the United States mainland, Alaska, Hawaii, or such a possession,

(C) the unloading of cargo described in subparagraph (A) or (B) in Alaska, Hawaii, or any possession of the United States, or in the United States mainland, respectively, or

(D) cargo loaded on a vessel in Alaska, Hawaii, or a possession of the United States and unloaded in the State or possession in which loaded, or passengers transported on United States flag vessels operating solely within the State waters of Alaska or Hawaii and adjacent international waters.

26 U.S.C. § 4462(b).

[7] "[V]irtually everything going in and out [of Hawaii] must travel by ship. . . . A port user fee, therefore, would be levied on over 80% of all the states goods and materials." Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 30 (1985).

tax on the value of domestic merchandise is narrowly tailored toward relieving the burden of the *ad valorem* tax. Congress did not extend the exemption to foreign imports into Hawaii and Alaska or exports from Hawaii and Alaska.[8] As held in *Amoco*, "[t]he Alaska and Hawaii exemptions were enacted to prevent, not encourage geographic discrimination." *Amoco*, 63 F.Supp.2d at 1339.

Conceding that Hawaii is likely dependent upon shipping for domestic transportation because, Thomson argues that, despite its remote Northern location, Alaska does not exhibit the features of an island and should not receive the same unique treatment as Hawaii. At oral argument, Thomson pointed out that the only evidence that Alaska is disadvantaged was provided by one Alaskan Senator near the close of debate on the WRDA.[9] The inclusion of Alaska in the special rule, however, occurred following Senator Stevens' statements to the Senate, and following the detailed discussion on Hawaii's problems. It must be inferred that Congress found his argument that Alaska represented a geographically isolated problem convincing and not unlike the Hawaii situation. Consis-

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[8] The special rule of intrastate passengers of U.S. flag vessels has not been addressed by the parties in any detail, but Hawaii is a series of islands and overland transportation in Alaska is problematic.

[9] Senator Stevens of Alaska described:

> "Alaska's size, widely dispersed population, and geographic location combine to put fairly unique demands on our transportation system . . . Surface transportation in Alaska is almost exclusively waterborne. For much of Alaska waterborne shipping is the only way to get materials to communities where they will be used. These communities are almost entirely dependent on waterborne commerce for their basic supplies . . . We cannot recognize the unique needs of commerce with the islands and yet ignore the other State which is similarly situated. Waterborne shipments are an essential part of life in my home State. It is as much a part of Alaska's commerce as it is Hawaii's or any other place which is geographically isolated."

132 Cong. Rec. S2739-02, S2825, 99th Cong.2d Sess. (Mar. 14, 1986).

tent with *Amoco*, the court finds that Plaintiff fails to show actual discrimination or favoritism with respect to the special rule for Alaska and Hawaii domestic cargo.

b. Columbia River

Thomson next challenges what it argues is an implied exemption for a small portion of the Columbia River. The HMT defines the term port as including "the channels of the Columbia River in the States of Oregon and Washington only up to the downstream side of Bonneville lock and dam." 26 U.S.C. § 4462(a)(2)(C). Meanwhile, the IWFT on the inland waterway portion of the Columbia River only extends "[f]rom The Dalles at RM 191.5 to Pasco, Washington (McNary Pool), at RM 330, Snake River from RM 0 at the mouth to RM 231.5 at Johnson Bar Landing, Idaho." 33 U.S.C. § 1804(8). Thomson contends that, based on the geographic boundaries of these two provisions, the HMT and IWFT fail to cover a 47.5 mile stretch of Columbia River running upstream from the Bonneville lock and dam. Because the IWFT does not extend to the Bonneville lock, Thomson argues there are three ports along the Columbia River that are not subject to either the HMT or IWFT.[10] In support of their claim of actual discrimination, Thomson implied that the absence of legislative history explaining this anomaly somehow suggests that Congress had a hidden agenda to benefit ports along this stretch of river. Thomson's claim fails for several reasons.

First, the court will not presume that the absence of explanatory legislative history implies bad faith or discrimination. It is entirely likely that omission of this area from the WRDA funding scheme was an oversight. In *Amoco*,

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[10] The United States argues that only two ports are exempt (Hood River and Bingen, but not Dalles), that neither is engaged in any significant shipping commerce, and cargo at those ports would be exempt from both charges only if no other domestic port was involved, and if the shipment entered and left the port through the downstream portion of the Columbia River.

the court found that the so-called Columbia River exemption was more like a geographic definition than an exemption, with the section of the Columbia River that "is more like a port to be defined as a port and the portion of the river that is more like an inland waterway defined as such." *Amoco*, 63 F.Supp.2d at 1340. Plaintiff submits no support for its contrary theory of intentional discrimination or favoritism.

Second, Plaintiff has failed to establish that these ports actually benefit from increased trade and, therefore, has failed to establish actual discrimination or favoritism. Thomson does not indicate that any of these "exempt" ports were defined as the subject of the HMT, nor does it make any showing that their features are consistent with those of an HMT port. Even if these ports were HMT ports for the purposes of the Uniformity Clause, Plaintiff has submitted no evidence that these three ports currently benefit or will benefit from any gap in the WRDA scheme. While the court does not know the purpose of this omission, the court finds no evidence suggesting actual discrimination and favoritism. As discussed in *Amoco*, the Columbia River exemption is benign.

c. Exemptions Related to Inland Waterway Ports

Thomson next challenges the HMT under the Uniformity Clause based on other aspects of the HMT's overlapping relationship with the IWFT, including: (1) a claim that there are 378 shallow draft ports that are not subject to the IWFT, but eligible to receive funds from the HMT Fund; (2) fund appropriations from the IW Fund are limited to specific lock and dam construction, rehabilitation, and modernization projects along the inland waterway system, whereas fund appropriations from the HMT Fund are used for projects relating to both harbor maintenance and inland waterway projects; (3) where any part of a vessel's itinerary includes an inland waterway, that vessel is exempt from the HMT; and (4) the IWFT exempts deep-draft vessels, enabling deep-draft vessels to avoid

both taxes when part of its itinerary includes an inland waterway. Thomson argues that these exemptions create an unconstitutional competitive advantage for certain ports.

In *Augusta Towing Co. v. United States*, 5 Cl.Ct. 160 (1984), the United States Claims Court upheld the IWFT definition of inland waterway against a Uniformity Clause challenge, on the grounds that defining inland waterway as 26 specific inland waterways was rational and not discriminatory. At oral argument, Thomson attempted to distinguish the present case from *Augusta Towing*, contending that the Uniformity Clause analysis was different in *Augusta Towing* because the charge was found to be a user fee. Whether it was required to do so or not, the court examined the IWFT, "to determine whether the tax is uniform," "assuming that the Uniformity clause is applicable." *Id.* at 163 (emphasis added). The court found, "that the selection of the 26 waterways was not the result of any [deliberate combinations of states in Congress to secure improper advantages to themselves at the expense of other states]." *Id.* at 171. The court finds *Augusta Towing* persuasive.

As with the definition of inland waterway under the IWFT, the HMT definition of port use as, "any channel or harbor . . . which (i) is not an inland waterway, and (ii) is open to public navigation," 26 U.S.C. § 4462(a)(2)(A), does not appear to be the result of deliberate discrimination in favor of a majority of states. The fact that various exemptions may interact to create competitive advantages for certain ports is not deliberate geographic favoritism or discrimination. Plaintiff submits no evidence that deep draft vessels actually benefit from the exemption. Importantly, Plaintiff does not explain how the purpose of a vessel-specific exemption could be construed as geographically discriminatory in the sense required for a successful Uniformity Clause challenge.

Further, in order to be defined as a port under the HMT, the facility must receive federal funding. 26 U.S.C. § 4462(a)(1)(B). Plaintiff does not claim that 378 shallow draft ports unfairly receive funding but, instead, argues that some facilities are "eligible" to receive funding and, therefore, may receive the benefit of HMT funds without being subject to HMT charges. Plaintiff cites no support for the proposition that these facilities presently benefit from any discrimination, much less geographic discrimination. The court finds that Thomson has failed to show the actual geographic discrimination or favoritism prohibited by the Uniformity Clause.

C. Port Preference Clause

The Port Preference Clause provides that, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." U.S. Const. art. I, § 9, cl 6. "The origins of the Uniformity Clause are linked to those of the Port Preference Clause. The two were proposed together, and reported out of a special committee as an interrelated limitation on the National Government's commerce power. They were separated without explanation. . . ." *Ptasynski*, 462 U.S. at 81 n.10, 103 S.Ct. 2239 (citations omitted). "The preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."[11] *Knowlton*, 178 U.S. at 106, 20 S.Ct. 747.

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[11] There are two significant differences, however, in the application of the Port Preference Clause. First, it forbids only discrimination along state lines, while the Uniformity Clause does not have this limitation. Second, the Port Preference Clause is a limitation on the regulation of commerce, as well as taxation.

As with the Uniformity Clause, "[the Port Preference Clause] has never been relied on by the federal judiciary to hold an act of Congress unconstitutional." *Kansas v. United States*, 16 F.3d 436, 439 (D.C.Cir.1994), *cert. denied*, 513 U.S. 945, 115 S.Ct. 354, 130 L.Ed.2d 309 (1994). In the authoritative case on the Port Preference Clause, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 18 How. 421, 15 L.Ed. 435 (1855), the Supreme Court interpreted the clause narrowly, holding that direct discrimination, and not disparate effects, violates the Port Preference Clause. *Wheeling*, 59 U.S. 421, 18 How. 421. Further, "[w]hat is forbidden is not discrimination between individual ports within the same or different States, but discrimination between States." *Wheeling*, 59 U.S. at 424, 18 How. 421. More recently, in *Houston v. Federal Aviation Admin.*, 679 F.2d 1184, 1197 (5th Cir. 1982), the 5th Circuit found that government actions do not violate the Port Preference Clause even if they result in some detriment to a port, where they occur (1) as incident to some otherwise legitimate government act regulating commerce or (2) more as result of accident of geography than from intentional government preference.

In *Amoco*, 63 F.Supp.2d at 1341, this court found that a violation of the Port Preference Clause requires that an act of Congress explicitly discriminate against the ports of a particular state.[12] In that case, Amoco never alleged that Congress explicitly discriminated against any particular state. In the present case, however, Thomson alleges explicit discrimination by Congress. First, it alleges that the exemption for domestic cargo at the ports of Alaska and Hawaii provides an explicit preference *for* those two states and against the remaining forty-eight. Thomson next argues that by defining port to exclude ports along inland waterways, Congress provides an

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[12] The court cited *City of Milwaukee v. Yeutter*, 877 F.2d 540, 546 (7th Cir.1989) ("For two hundred years courts have understood that only explicit discrimination violates the Port Preference Clause").

explicit preference for all of the ports of those twenty states that only have inland waterway ports.

The court finds that Thomson's reading of the Port Preference Clause fails to acknowledge the intent of the framers. The clause, "gave small states protection against deliberate discrimination against them by other, more powerful states." *Houston*, 679 F.2d at 1198. In devising an appropriate test for determining a violation of the Port Preference Clause, the court follows the clear intent of the framers and the guidance of the Supreme Court in *Ptasynski*, 462 U.S. at 84-85, 103 S.Ct. 2239, regarding its test for determining a violation of the Uniformity Clause.

Where an act of Congress does not provide a preference for all of the ports of one state, over all of the ports of another, there is no violation of the Port Preference Clause. *See Wheeling*, 59 U.S. at 424, 18 How. 421. But, where Congress does provide such a preference, the Court must look closely at the legislation to discern whether Congress intended to channel commerce toward all of the ports of a favored state or, instead, was attempting to address a geographically isolated problem. *See Ptasynski*, 462 U.S. at 84-85, 103 S.Ct. 2239.

1. Exemption for Hawaii and Alaska

Thomson contends that the Port Preference Clause is a complete barrier to any express preference for all of the ports of one state over all of the ports of another. By exempting Alaska and Hawaii domestic cargo, Congress arguably granted an express preference to those two states. Under Thomson's interpretation of the Port Preference Clause, there is no room for Congress to address a geographically isolated problem exacerbated by a generally applicable statute, if Congress must utilize state borders to do so.

In *United States v. Lopez*, 514 U.S. 549, 587, 115 S.Ct. 1624, 131 L.Ed 2d 626 (1995) (Thomas, C., concurring), Justice Thomas stated, "the more natural reading is that

the (Port Preference Clause) prohibits Congress from using its commerce power to channel commerce through certain favored ports." Far from channeling commerce through all the ports of Alaska and Hawaii and away from all of the states where HMT ports are not exempt from domestic movement of cargo, Congress appeared to address a problem of geographic isolation. The Alaska and Hawaii domestic cargo exemption is designed to offset the increased costs of the HMT associated with domestic cargo in the two states that are not contiguous with the rest of the United States. In its deliberations, Congress considered whether the HMT would have a disproportionate impact on domestic commerce in Alaska and Hawaii. Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 30 (1985).

That Congress attempted to address an isolated problem of geographical origin is supported by two components of the Alaska and Hawaii domestic cargo exemption. First, as is clear from the statute, only domestic cargo movements, not international cargo movements, are exempt. 26 U.S.C. § 4462(b)(1). The ports of Alaska and Hawaii are given no competitive advantage in attracting imports from foreign countries or in exporting, as internationally they are similarly situated to the remainder of the United States. Thomson does not suggest that shippers channel domestic cargo away from other ports, toward the limitedly exempt ports of Alaska and Hawaii. Second, all ports in all states are exempt from the HMT on domestic merchandise that travels to or from Alaska or Hawaii. This aspect of the exemption clearly indicates that Congress intended to encourage domestic commerce with Alaska and Hawaii because of their isolation, rather than channel commerce toward the ports of favored states. The court finds that the Alaska and Hawaii domestic cargo exemption is narrowly tailored to meet the isolated problems of two states that are uniquely

dependent on ocean transportation for domestic merchandise and would be disproportionally impacted by the HMT, save for the exemption, and, therefore, the exemption does not violate the Port Preference Clause.[13]

2. Exemption for Ports Along Inland Waterways

Thomson argues that by defining ports to exclude ports located along inland waterways, and thus exempting twenty states that only contain inland waterways ports, the HMT provides an explicit preference for all of the ports of those states, in violation of the Port Preference Clause. Thomson's reading of the Clause is inconsistent with the holding in *Augusta Towing*, 5 Cl.Ct. 160, where a challenge to the IWFT was brought on the grounds that all of the ports in certain states are being taxed, while none of the ports of other states are being taxed. In that case the court found, "[w]hile it may be true that the ports of some states are indirectly disadvantaged compared to the ports of other states because fuel used on the waterways leading to them is taxed", this fact does not bring the tax within the constitutional prohibition. *Id.* at 165. Further, "[a]cts of Congress that only incidentally benefit some ports at the expense of others do not confer a preference on the ports of one state over those of another within the meaning of the clause." *Augusta Towing*, 5 Cl.Ct. at 165. The court sees no reason why these principles should not apply here.

In enacting the HMT, Congress taxed cargo at ports of every coastal state in the same manner, excluding from the definition of "port" those ports located along inland waterways, for the purpose of avoiding double taxation at ports that are on waterways subject to the IWFT. Making fuel on vessels at certain ports located along inland waterways subject to the IWFT, and cargo at certain deepwater ports subject to the HMT, is a rational attempt by

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[13] The court does not reach the issue of the severability of the exemption from the HMT statute.

Congress to avoid the adverse consequences of different laws operating on merchandise on the same vessel. The HMT definition of port use with its exemptions represents a rational choice by Congress and is not improperly geographically discriminatory. It is thus constitutional under the Port Preference Clause.

CONCLUSION

Accordingly, the court finds that the HMT on imports is a tax, severable from the unconstitutional HMT on exports, and constitutional under the Port Preference Clause and Uniformity Clause. It is hereby ordered that Defendant's motion for summary judgment is granted.

APPENDIX C

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 95-03-00277

THOMSON CONSUMER ELECTRONICS, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

ORDER

Stay is lifted so that this matter may proceed as a test case. The parties shall submit a scheduling order within 20 days hereof.

/s/ JANE A. RESTANI
Jane A. Restani
Judge

Dated: New York, New York
This 25th day of August, 1998.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

November 7, 2003

Mr. David C. Frederick
Kellogg Huber Hansen Todd & Evans
1615 M Street, NW
Suite 400
Washington, DC 20036

Re: Thomson, Inc., fka Thomson Multimedia Inc.
v. United States
Application No. 03A399

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on November 7, 2003 extended the time to and including December 16, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By
/s/ EMILIE LANSTRA
Emilie Lanstra
Case Analyst

[attached notification list omitted]

APPENDIX E

Constitutional Provisions

The Uniformity Clause of the U.S. Constitution, art. I, § 8, cl. 1, provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

The Port Preference Clause of the U.S. Constitution, art. I, § 9, cl. 6, provides:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Statutory Provisions

The Harbor Maintenance Tax statutes, 26 U.S.C. §§ 4461-4462, provide:

26 U.S.C. § 4461. Imposition of tax

(a) General rule. – There is hereby imposed a tax on any port use.

(b) Amount of tax. – The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax. –

(1) Liability. – The tax imposed by subsection (a) shall be paid by –

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of imposition. – Except as provided by regulations, the tax imposed by subsection (a) shall be imposed –

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

26 U.S.C. § 4462. Definitions and special rules

(a) Definitions. – For purposes of this subchapter –

(1) Port use. – The term "port use" means –

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from,

a commercial vessel at a port.

(2) Port. –

(A) In general. – The term "port" means any channel or harbor (or component thereof) in the United States, which –

(i) is not an inland waterway, and

(ii) is open to public navigation.

(B) Exception for certain facilities. – The term "port" does not include any channel or harbor with respect to which no Federal funds have been used since 1977 for construction, maintenance, or operation, or which was deauthorized by Federal law before 1985.

(C) Special rule for Columbia River. – The term "port" shall include the channels of the Columbia River in the States of Oregon and Washington only up to the downstream side of Bonneville lock and dam.

(3) Commercial cargo. –

(A) In general. – The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

(B) Certain items not included. – The term "commercial cargo'" does not include –

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

(4) Commercial vessel. –

(A) In general. – The term "commercial vessel" means any vessel used –

(i) in transporting cargo by water for compensation or hire, or

(ii) in transporting cargo by water in the business of the owner, lessee, or operator of the vessel.

(B) Exclusion of ferries. –

(i) In general. – The term "commercial vessel" does not include any ferry engaged primarily in the ferrying of passengers (including their vehicles) between points within the United States, or between the United States and contiguous countries.

(ii) Ferry. – The term "ferry" means any vessel which arrives in the United States on a regular schedule during its operating season at intervals of at least once each business day.

(5) Value. –

(A) In general. – The term "value" means, except as provided in regulations, the value of any commercial cargo as determined by standard commercial documentation.

(B) Transportation of passengers. – In the case of the transportation of passengers for hire, the term "value" means the actual charge paid for such service or the prevailing charge for comparable service if no actual charge is paid.

(b) Special rule for Alaska, Hawaii, and possessions. –

(1) In general. – No tax shall be imposed under section 4461(a) with respect to –

(A) cargo loaded on a vessel in a port in the United States mainland for transportation to Alaska, Hawaii, or any possession of the United States for ultimate use or consumption in Alaska, Hawaii, or any possession of the United States,

(B) cargo loaded on a vessel in Alaska, Hawaii, or any possession of the United States for transportation to the United States mainland, Alaska, Hawaii, or such a possession for ultimate use or consumption in the United States mainland, Alaska, Hawaii, or such a possession,

(C) the unloading of cargo described in subparagraph (A) or (B) in Alaska, Hawaii, or any possession of the United States, or in the United States mainland, respectively, or

(D) cargo loaded on a vessel in Alaska, Hawaii, or a possession of the United States and unloaded in the State or possession in which loaded, or passengers transported on United States flag vessels operating solely within the State waters of Alaska or Hawaii and adjacent international waters.

(2) Cargo does not include crude oil with respect to Alaska. – For purposes of this subsection, the term "cargo" does not include crude oil with respect to Alaska.

(3) United States mainland. – For purposes of this subsection, the term "United States mainland" means the continental United States (not including Alaska).

(c) Coordination of tax where transportation subject to tax imposed by section 4042. – No tax shall be imposed under this subchapter with respect to the loading or unloading of any cargo on or from a vessel if any fuel of such vessel has been (or will be) subject to the tax imposed by section 4042 (relating to tax on fuel used in commercial transportation on inland waterways).

(d) Nonapplicability of tax to certain cargo. –

(1) In general. – Subject to paragraph (2), the tax imposed by section 4461(a) shall not apply to bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country.

(2) Imposition of charges. – Paragraph (1) shall not apply to any cargo exported to Canada or Mexico –

(A) during the period –

(i) after the date on which the Secretary determines that the Government of Canada or Mexico (as the case may be) has imposed a substantially equivalent tax, fee, or charge on commercial vessels or commercial cargo utilizing ports of such country, and

(ii) subject to subparagraph (B), before the date on which the Secretary determines that such tax, fee, charge has been discontinued by such country, and

(B) with respect to a particular United States port (or to any transaction or class of transactions at any such port) to the extent that the study made pursuant to section 1407(a) of the Water Resources Development Act of 1986 (or a review thereof pursuant to section 1407(b) of such Act) finds that –

(i) the imposition of the tax imposed by this subchapter at such port (or to any transaction or class of transactions at such port) is not likely to divert a significant amount of cargo from such port to a port in a country contiguous to the United States, or that any such diversion is not likely to result in significant economic loss to such port, or

(ii) the nonapplicability of such tax at such port (or to any transaction or class of transactions at such port) is likely to result in significant economic loss to any other United States port.

(e) Exemption for United States. – No tax shall be imposed under this subchapter on the United States or any agency or instrumentality thereof.

(f) Extension of provisions of law applicable to customs duty. –

(1) In general. – Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.

(2) Jurisdiction of courts and agencies. – For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.

(3) Administrative provisions applicable to tax law not to apply. – The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

(g) Special rules. – Except as provided by regulations

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(1) Tax imposed only once. – Only 1 tax shall be imposed under section 4461(a) with respect to the loading on and unloading from, or the unloading from and the loading on, the same vessel of the same cargo.

(2) Exception for intraport movements. – Under regulations, no tax shall be imposed under section 4461(a) on the mere movement of cargo within a port.

(3) Relay cargo. – Only 1 tax shall be imposed under section 4461(a) on cargo (moving under a single bill of lading) which is unloaded from one vessel and loaded onto another vessel at any port in the United States for relay to or from any port in Alaska, Hawaii, or any possession of the United States. For purposes of this paragraph, the term "cargo" does not include any item not treated as cargo under subsection (b)(2).

(h) Exemption for humanitarian and development assistance cargos. – No tax shall be imposed under this subchapter on any nonprofit organization or cooperative for cargo which is owned or financed by such nonprofit organization or cooperative and which is certified by the United States Customs Service as intended for use in humanitarian or development assistance overseas.

(i) Regulations. – The Secretary may prescribe such additional regulations as may be necessary to carry out the purposes of this subchapter including, but not limited to, regulations –

(1) providing for the manner and method of payment and collection of the tax imposed by this subchapter,

(2) providing for the posting of bonds to secure payment of such tax,

(3) exempting any transaction or class of transactions from such tax where the collection of such tax is not administratively practical, and

(4) providing for the remittance or mitigation of penalties and the settlement or compromise of claims.

APPENDIX F

Table 3
Harbor Maintenance Tax Collections by Source, Fiscal Years 1987 - 2002
(thousands of dollars)

Fiscal Year	Imports	Exports	Foreign Trade Zone	Domestic	Passengers	Net Collections	Cumulative Total
1987	43,249	6,777	677	2,414	120	53,237	53,237
1988	99,793	35,938	3,120	9,170	551	148,572	201,809
1989	105,927	44,618	3,876	8,590	666	163,677	365,486
1990	109,215	45,808	4,020	9,069	559	168,671	534,157
1991	258,321	93,194	9,166	19,518	1,977	382,176	916,333
1992	342,402	142,916	16,974	28,451	3,275	534,018	1,450,351
1993	361,678	169,141	20,959	31,858	4,748	588,384	2,038,735
1994	391,679	168,241	21,895	34,558	4,811	621,184	2,659,919
1995	418,858	214,821	14,548	20,241	2,792	671,260	3,331,179
1996	409,708	209,217	27,982	26,788	3,179	676,874	4,008,053
1997	438,395	209,439	48,444	32,828	3,865	732,971	4,741,024
1998	462,895	94,998	45,319	39,158	2,460	644,830	5,385,854
1999	484,169	-49,552	66,674	48,801	1,213	551,305	5,937,159
2000	558,513	- 9,587	76,883	44,502	2,152	672,463	7,609,622
2001	583,198	2,455	86,285	39,365	10,309	721,612	8,331,234
2002	544,746	1,566	69,115	27,786	- 9,643	652,856	8,984,090
Totals	**5,612,746**	**1,379,990**	**515,937**	**423,097**	**52,320**	**8,984,090**	

Source: Office of Finance, U.S. Customs Service, Department of the Treasury
Notes: HMT collections will differ from deposits into the HMTF due to reporting time and estimate errors.
Effective January 1, 1991, the HMT increased from 0.04% *ad valorem*, to 0.125%
HMT collections on exports halted April 25, 1998. Negative amount for exports in FY 1999 & 2000 reflects adjustments by U.S. Customs.

Table 7
Harbor Maintenance Trust Fund Revenues and Transfers, Fiscal Years 1989 - 2002
(thousands of dollars)

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Beginning Balance	9,715	12,312	30,254	72,795	120,931	303,277	451,385	621,194	866,063	1,112,241	1,289,018	1,608,957	1,667,642	1,818,841
Revenues:														
Harbor Maint. Tax Collections	166,000	180,493	374,420	505,827	628,462	622,253	670,532	698,267	735,534	621,500	552,835	677,589	721,612	652,856
Toll Receipts	9,806	8,849	9,267	8,733	8,739	11,112	173	0	0	0	0	0	0	0
Interest*	7,343	8,281	11,814	16,502	13,521	12,826	30,186	40,870	53,632	66,370	62,766	82,965	89,156	57,933
Net Revenue	183,149	197,623	395,501	531,062	650,722	646,191	700,891	739,137	789,166	687,870	615,601	760,554	810,768	710,790
Net Available	192,864	209,935	425,755	603,571	771,653	949,468	1,152,276	1,360,331	1,655,230	1,800,111	1,904,619	2,369,511	2,478,410	2,529,631
Transfers:														
Corps of Engineers	159,026	159,074	333,401	462,229	446,434	476,620	519,196	482,126	535,987	496,900	281,202	686,898	643,601	639,909
St. Lawrence Seaway D.C.	10,382	11,397	9,075	10,950	13,584	10,765	10,193	9,539	10,322	11,000	11,260	11,771	12,775	13,105
SLS Toll Rebates	10,977	9,041	10,298	9,565	8,074	9,546	1,512	0	0	0	0	0	0	0
Dept. of Transportation	0	0	0	16	160	175	181	169	193	193	200	200	200	200
Administrative Costs	167	169	186	184	124	0	0	3,000	3,000	3,000	3,000	3,000	2,793	3,000
Net Expenditures	180,552	179,681	352,960	482,944	468,376	497,106	531,082	494,834	549,502	511,093	295,662	701,869	659,569	656,214
Surplus	12,312	30,254	72,795	120,627	303,277	452,362	621,194	865,497	1,105,728	1,289,018	1,608,957	1,667,642	1,818,841	1,873,417

Source: Funds Accounting Branch, Financial Management Services, Department of the Treasury.
Does not include Interest Income which is not available for obligation. "Interest" represents the total interest accrued on interest bearing securities during the fiscal year, including interest from securities that matured in FY 2002 and an estimate of interest accrued on longer-term investments (net of interest previously accrued). For FY 2002 the interest actually deposited in the fund was $76.6 million.

(4)

No. 03-882

In the Supreme Court of the United States

THOMSON, INC.,
F/K/A THOMSON MULTIMEDIA INC., PETITIONER

v.

UNITED STATES OF AMERICA

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461-4462, continues in force as applied to imports, notwithstanding this Court's holding in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 370 (1998), that the HMT, "as applied to exports," violates the Export Clause, U.S. Const. Art. I, § 9, Cl. 5.

2. Whether the HMT, as applied to imports, violates the Uniformity Clause, U.S. Const. Art. I, § 8, Cl. 1.

3. Whether the HMT, as applied to imports, violates the Port Preference Clause, U.S. Const. Art. I, § 9, Cl. 6.

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In the Supreme Court of the United States

No. 03-882

THOMSON, INC.,
F/K/A THOMSON MULTIMEDIA INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 340 F.3d 1355. The opinion of the Court of International Trade (Pet. App. 20a-37a) is reported at 219 F. Supp. 2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2003. On November 7, 2003, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 16, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Congress enacted the Harbor Maintenance Tax (HMT) as part of the Water Resources Development Act (WRDA) of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (33 U.S.C. 2201 *et seq.*). The HMT imposes a fee "on any port use" by commercial importers, exporters, domestic shippers, and passenger liners. 26 U.S.C. 4461(a). For shipments of goods, the amount of the HMT is set at "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). The purpose of the HMT is to require the entities that benefit from use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The fees collected by the United States are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a) and (c).

2. In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that the HMT, as applied to shipments of exports, violates the Export Clause, which states that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. The Court recognized that the Export Clause imposes no bar against an appropriate port use fee (523 U.S. at 367), and emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance" (*id.* at 370). The Court held that *Pace* v. *Burgess*, 92 U.S. 372 (1876), governs the determination whether an assessment "constitutes a bona fide user fee in the Export Clause context." 523 U.S. at 369. The Court explained that the more flexible test for identifying

user fees applied in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), is applicable under "constitutional provisions other than the Export Clause," because "the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368.

The Court concluded that the HMT, as applied to exports, fails to satisfy the strict test for a bona fide user fee applicable under the Export Clause, because the value of a shipment's cargo, which determines the amount of the HMT, does not adequately correlate to the extent to which an exporter uses federal harbor services, facilities, and benefits. 523 U.S. at 367-370. The Court therefore held that the HMT, as applied to exports, is a tax barred by the Export Clause. *Ibid.* The Court recognized, however, that *ad valorem* assessments that amount to an invalid "tax or duty" under the Export Clause might nonetheless qualify as a valid user fee under other constitutional provisions. *Id.* at 368-369 (citing, *inter alia*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989), which upheld an *ad valorem* fee against a Takings Clause challenge on the ground that the Court has "never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services").

3. Petitioner, an importer, filed this challenge to the constitutionality of the HMT in 1995. The case was pending in the Court of International Trade when *United States Shoe* was decided. On August 25, 1998, the Court of International Trade designated this case as a test case for challenges to the HMT's application to import shipments. On August 21, 2002, the court granted summary judgment in favor of the government. Pet. App. 20a-37a.

a. The court first rejected petitioner's claim that the HMT's application to imports could not be severed from the HMT's invalid application to exports. The court relied on previous decisions of the court of appeals that had held—based on the severability clause of the WRDA (of which the HMT is a part), 33 U.S.C. 2304—"that the unconstitutional export provision in the [Harbor Maintenance Tax] is severable from the remainder of the statute." Pet. App. 22a (quoting *Amoco Oil Co.* v. *United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000)); see *Princess Cruises, Inc.* v. *United States*, 201 F.3d 1352, 1358 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000); *Carnival Cruise Lines, Inc.* v. *United States*, 200 F.3d 1361, 1369 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000).

b. The court next rejected petitioner's claim that the HMT's application to imports was invalid under the Uniformity Clause, which states that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1. Petitioner argued that the HMT, as applied to imports, is a tax subject to the Uniformity Clause rather than a user fee, and that the HMT is not "uniform" under the Clause because it contains: (i) a limited exemption for unloading of domestic consumable merchandise (excluding Alaskan crude oil) shipped between the continental United States and Alaska, Hawaii, or United States possessions, 26 U.S.C. 4462(b); (ii) an implied exemption for a 47-mile stretch of the Columbia River in Washington and Oregon, 26 U.S.C. 4462(a)(2)(C); and (iii) an exemption for inland waterways, 26 U.S.C. 4462(a)(2)(A)(i).

The court agreed with petitioner that the HMT, as applied to imports, constitutes a tax rather than a bona fide user fee. Pet. App. 23a-24a. But the court concluded that the HMT's application to imports nonethe-

less does not infringe the Uniformity Clause because there was no evidence of actual regional favoritism or discrimination with respect to the exemptions identified by petitioner. *Id.* at 24a-32a.

c. Finally, the court rejected petitioner's challenge under the Port Preference Clause, which states that "No Preference shall be given * * * to the Ports of one State over those of another." U.S. Const. Art. I, § 9, Cl. 6. Petitioner argued that the HMT's domestic cargo exemption for Alaska and Hawaii and the exemption related to inland waterways constitute an invalid preference for the ports of certain States. The court found that argument unpersuasive, ruling that any benefit or detriment to the ports of certain States does not represent intentional geographic discrimination between States in violation of the Port Preference Clause. Pet. App. 36a-37a.

4. The court of appeals affirmed. Pet. App. 1a-19a.[1]

a. The court of appeals adhered to its previous decisions holding that the "export provision of the HMT is severable" from the HMT's remaining applications. Pet. App. 6a. The court rejected petitioner's contention that the previous decisions should not be followed because the HMT, insofar as it applies to imports but not exports, violates international trade agreements. The court explained that its previous decisions did not turn on whether the HMT infringed international trade agreements, but "relied, instead, on the presence of a

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[1] The court of appeals issued a single opinion resolving both the appeal in this case and the appeal in a separate challenge brought by CF Industries, Inc., a domestic shipper that challenged the HMT as applied to domestic shipping. CF Industries filed a separate petition for a writ of certiorari on December 16, 2003 (No. 03-867), and the government has filed a brief in opposition to that petition.

severability clause in the WRDA (of which the HMT was a part) and the fact that 'the legislative history of the statute does not show that Congress would not have imposed the [HMT] without applying it to exports.'" *Ibid.* (quoting *Carnival*, 200 F.3d at 1366-1367).

b. The court of appeals next held that the HMT, as applied to imports, does not violate the Uniformity Clause. Pet. App. 7a-14a. Whereas the Court of International Trade had found that the HMT's application to imports constitutes a tax subject to the Uniformity Clause but does not run afoul of the Clause's uniformity standard, the court of appeals concluded that the HMT's application to imports is a bona fide user fee rather than a tax and thus falls outside the scope of the Clause altogether. The court of appeals, relying on this Court's opinion in *United States Shoe*, reasoned that because this case does not involve a challenge under the Export Clause, the less stringent standard for a bona fide user fee prescribed by *Massachusetts*, 435 U.S. at 464, governs the analysis. Pet. App. 7a-9a. Observing that "*ad valorem* charges are generally upheld in contexts outside of the Export Clause," the court concluded "that the HMT's *ad valorem* charge is based upon a fair approximation of the costs of the benefits provided for port users." *Id.* at 11a-12a.

c. The court of appeals also upheld the HMT's application to imports against petitioner's challenge under the Port Preference Clause. Pet. App. 14a-19a.[2]

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[2] The government argued in the court of appeals that petitioner, as an *importer*, lacks standing to challenge the HMT's exemption for *domestic* shipments to and from Alaska and Hawaii because, even if the court were to invalidate the exemption, petitioner's own tax burden would remain unaffected. See *Ward* v. *Commissioner*, 608 F.2d 599, 601 (5th Cir. 1979), cert. denied, 446

The court explained that the Port Preference Clause "prohibits only intentional, effectual preference of the ports of one state over the ports of another state, advantaging certain states' ports by disadvantaging other states' ports." *Id.* at 16a.

The court rejected "out of hand" petitioner's reliance on the HMT's exemptions relating to inland waterways, reasoning that the exemptions do not "give[] express preference to the ports of one state over another." Pet. App. 14a n.5. The court next held that the HMT's domestic cargo exemption for Alaska, Hawaii, and United States possessions does not infringe the Port Preference Clause, because "it is clear that the intent and effect" of the exemption was "not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on shipping-dependent states and possessions." *Id.* at 17a-18a. The court further explained that the exemption applies not only in the ports of Alaska and Hawaii, but also in the ports of any state when receiving shipments from Alaska and Hawaii. The court thus found it "difficult to discern an actual preference" for the ports of those States, as opposed to a recognition "that the ports of both states are geographically isolated and as such are more heavily dependent on domestic shipping to receive goods." *Id.* at 18a.[3]

U.S. 918 (1980). The court of appeals denied petitioner's challenge without addressing the issue of petitioner's standing.

[3] The court observed that there was no significance to the fact that the HMT singles out Alaska and Hawaii by name, explaining that naming the two States (as well as United States possessions) "merely served as a proxy for a complex formula defining exces-

ARGUMENT

The court of appeals correctly held that: (i) the HMT's application to imports continues in force and is severable from the HMT's application to exports; (ii) the HMT, as applied to imports, falls outside the scope of the Uniformity Clause because it qualifies as a user fee for purposes of that Clause; and (iii) the HMT's exemption for domestic cargo (excluding Alaskan crude oil) shipped to and from Alaska, Hawaii, and United States possessions, as well as the exemptions related to inland waterways, do not violate the Port Preference Clause. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 8-16) that the import provisions of the HMT are not severable from the unconstitutional export provisions. The court of appeals correctly rejected that contention, relying on its previous decisions in *Carnival Cruise Lines, Inc.* v. *United States*, 200 F.3d 1361, 1369 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000), and *Princess Cruises, Inc.* v. *United States*, 201 F.3d 1352, 1358 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000). Pet. App. 5a-6a. Petitions for writs of certiorari raising the severability issue were filed in both of those cases. This Court denied review, and there is no reason for a different result here.

a. The Court has instructed that "an unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). That "inquiry is eased when Con-

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sive isolation causing a greater dependency on domestic cargo than that experienced by other coastal states." Pet. App. 19a.

gress has explicitly provided for severance by including a severability clause in the statute," in which case, absent "strong evidence that Congress intended otherwise," the unconstitutional provisions are severed and the statute otherwise remains in force. *Id.* at 686.

The WRDA, which enacted the HMT, contains a severability provision. That provision states:

> If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

33 U.S.C. 2304. It follows, as the court of appeals correctly held, that the HMT's unconstitutional application to exports is severable from the HMT's remaining applications, including to imports.

There is no merit to petitioner's contention (Pet. 14) that the WRDA's severability provision does not apply to the HMT. See *Carnival*, 200 F.3d at 1368-1369 (rejecting that contention). The severability provision was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, § 949, 100 Stat. 4082, 4201, and it applies whenever "any provision of this Act [*i.e.*, the WRDA], or the application of any provision of this Act * * * is held invalid." 33 U.S.C. 2304. Because the HMT was also enacted as part of the WRDA, § 1402, 100 Stat. 4266-4269, a court ruling invalidating a provision or application of the HMT necessarily constitutes a ruling invalidating a "provision of this Act, or the application of [a] provision of this Act" (33 U.S.C. 2304) within the meaning of the severability clause. Petitioner observes (Pet. 14) that Congress provided in Title XIV of the WRDA, which enacted the HMT, that the Title could be referred to as the "Harbor

Maintenance Revenue Act of 1986," § 1401, 100 Stat. 4266. But there is no dispute that Title XIV was enacted as part of (the fourteenth title of) the WRDA, and there thus can be no dispute that the WRDA's severability provision applies by its terms to the HMT.[4]

Contrary to petitioner's argument (Pet. 14-15), severing the HMT's invalid export provisions would not entail an impermissible judicial re-writing of the statute. Insofar as petitioner means to suggest that severability is permissible only when it entails striking discrete provisions from a statute, petitioner is wrong. This Court has made clear that a statute may be invalidated in certain applications while remaining in force in its valid applications, regardless of whether severing the category of unconstitutional applications can be achieved simply by excising particular statutory terms. See, *e.g.*, *United States* v. *Grace*, 461 U.S. 171, 178-184 & n.9 (1983) (holding that statute barring First Amendment activity on the Supreme Court's "grounds" is invalid as applied to the public sidewalks surrounding the Court, notwithstanding that the law contains no separate provision dealing specifically with the sidewalks); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504-507 (1985); *Wisconsin* v. *Yoder*, 406 U.S. 205, 207 n.2, 234-236 & n.22 (1972).

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[4] The HMT is categorically exempt from the full complement of administrative and enforcement provisions that generally apply to the tax laws, 26 U.S.C. 4462(f)(3), which includes, among numerous other provisions, a severability clause for tax statutes, 26 U.S.C. 7852(a). Because the HMT's blanket exemption from administrative and enforcement provisions encompasses numerous provisions other than the Internal Revenue Code's severability provision, petitioner errs in suggesting (Pet. 14) that the blanket exemption somehow negates the fact that the WRDA's severability clause, by its express terms, applies to the HMT.

Moreover, the severability clause at issue here applies not only when a "*provision* of [the] Act" is held invalid, but also when any "*application* of any provision of [the] Act to any person or circumstance, is held invalid," and Congress specified that "the remainder of [the] Act, shall not be affected thereby." 33 U.S.C. 2304 (emphasis added). This Court has recognized the distinction between a severability clause that calls for severing discrete provisions and one that calls for severing statutory applications, and has observed that a legislature may specifically "provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 (1992); see *Brockett*, 472 U.S. at 506-507 & n.14 (relying in part on similar severability provision in holding that there was "no obstacle to partial invalidation" of statute).

In any event, the HMT separately provides for imposition of the fee against an "importer" (26 U.S.C. 4461(c)(1)(A)), an "exporter" (26 U.S.C. 4461(c)(1)(B)), and a "shipper" (26 U.S.C. 4461(c)(1)(C)). The text of the HMT thus readily permits severing its unconstitutional application to exports, leaving in place a statute that designates how the amount of the HMT is to be determined (based on the value of cargo), who is to pay it (importers and shippers), and when it is to be paid (at the time of unloading). See *Carnival*, 200 F.3d at 1367. Thus, "the text * * * identifie[s] a clear line" for severance. *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997) (citing *Brockett* and *Grace*).

b. Relying on legislative history primarily consisting of individual floor statements and remarks in congressional hearings, petitioner argues (Pet. 10-13) that Congress would not have enacted the HMT if it could

not be applied to exports. Petitioner's argument does not approach demonstrating the requisite "strong evidence" needed to overcome the presumption that Congress would have favored severing the HMT's invalid application to exports. *Brock*, 480 U.S. at 686. As the court of appeals explained in *Carnival*, the HMT was enacted "to raise money to help fund the port and harbor improvements" envisioned by the WRDA. 200 F.3d at 1367; see H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4 , at 42 (1985); S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The HMT "continue[s] to perform that function, although on a lesser scale," even though it may not be applied to exports. *Carnival*, 200 F.3d at 1367.

Congress of course would have preferred for the HMT to apply to exports. Any inquiry into severability, however, necessarily entails an assessment of what option would have been viewed by the legislature as second-best. Here, the second-best solution is readily apparent. At the time it passed the WRDA, Congress was aware that the Export Clause might bar application of the HMT to exports. *Carnival*, 200 F.3d at 1367. Congress nevertheless enacted the HMT and made it subject to a severability clause. Nothing in the legislative history demonstrates that, if Congress had known that it could not impose the HMT on exports, it would have elected to impose no HMT at all. See *id.* at 1367-1369. Indeed, in the six years since this Court's decision in *United Shoe*, Congress has taken no steps to restrict assessment of the remaining fees.[5]

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[5] Petitioner errs in suggesting (Pet. 11) that, because the "precise form [of the HMT] enacted by Congress" was "essential to the passage of the entire WRDA," it would be inappropriate to sever the HMT's invalid export provisions. That argument ignores that

Petitioner stresses (Pet. 10) Congress's desire to minimize competitive disadvantages among cargo types in the application of the HMT. As the court of appeals recognized (*Carnival*, 200 F.3d at 1367-1368), however, Congress's concern was to avoid disadvantaging shippers of high-volume products such as coal in relation to shippers of high-value products such as computer chips —not to avoid disadvantaging importers, domestic shippers, or cruise lines in relation to exporters. See H.R. Rep. No. 251, *supra*, at 24-26. To the extent that Congress was troubled by the relative burdens on exporters and importers, the concern was to avoid overburdening exporters, not to achieve equity for importers. *Carnival*, 200 F.3d at 1367-1368.[6]

2. Petitioner contends (Pet. 16-23) that the HMT, as applied to imports, is a tax subject to the Uniformity Clause rather than a bona fide user fee. That contention lacks merit and was correctly rejected by the court of appeals.

a. Congress intended for the HMT to be a user fee rather than a tax. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985) ("The taxes and fees in this legislation

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"the passage of the entire WRDA" included enactment of the WRDA's severability clause, which applies by its terms to the HMT.

[6] Contrary to petitioner's argument (Pet. 11), any concerns about the effect on trade relations of excluding exports from the HMT would not justify an inference that Congress preferred no HMT at all over an HMT that does not apply to exports. At the time that Congress enacted the WRDA, the implications of any trade disputes that might arise were wholly speculative. In any event, as the court of appeals recognized in *Carnival*, if a trade dispute were to arise and "the result [were] to create serious problems, either the executive or the legislative branch presumably will take appropriate action." 200 F.3d at 1369.

are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels.").[7] Because this case concerns the application of the HMT to imports rather than exports, the court of appeals, following this Court's direction in *United States Shoe*, 523 U.S. at 367-368, applied the framework prescribed by *Massachusetts* v. *United States*, 435 U.S. 444, for determining (outside the context of the Export Clause) whether an assessment constitutes a bona fide user fee. See pp. 2-3, *supra*.

Petitioner errs in asserting (Pet. 17-18) that this Court's analysis of the HMT's export provisions in *United States Shoe* "applies with equal force" to the question whether the HMT constitutes a bona fide user fee with respect to imports. The Court made clear throughout its opinion that its analysis applied only under the Export Clause, specifically emphasizing that the "Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368. The Court therefore applied *Pace* v. *Burgess*, 92 U.S. 372 (1876), "[t]he guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context." 523 U.S. at 369. The Court ultimately concluded that "*Pace* establishes that, *under the Export Clause*, the connection between a service the Government renders and the compensation it receives * * * must be closer than is

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[7] Although the HMT is referred to as a "tax," 26 U.S.C. 4461, that of course is not dispositive of whether the HMT qualifies as a bona fide user fee. See *United States Shoe*, 523 U.S. at 367 ("[W]e must regard things rather than names * * * in determining whether an imposition on exports ranks as a tax.") (citation and internal quotation marks omitted).

present here" in order for the charge to qualify as a bona fide user fee. *Ibid.* (emphasis added). That conclusion was explicitly confined to the particular context of claims arising under the Export Clause, and it has no application here.

Petitioner errs for similar reasons in claiming (Pet. 19-20) that, if a charge when applied to exports is a "tax" prohibited by the Export Clause, the charge when applied to non-exports is necessarily an "excise" subject to the Uniformity Clause. The Court rejected a similar argument in *United States* v. *IBM*, 517 U.S. 843, 857 (1996), concerning the relationship between the term "tax" in the Export Clause and the terms "duty" and "impost" in the Import-Export Clause, U.S. Const. Art. I, § 10, Cl. 2. The Court explained that its decisions have "left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax and would be subject to the Export Clause." 517 U.S. at 857. And the Court made clear in *United States Shoe* that, when Congress intends for an assessment to constitute a user fee, there must be a closer relationship between the charge and the service supplied to satisfy the strict test that applies under the Export Clause than under the more flexible *Massachusetts* test that controls when applying other constitutional provisions. See 523 U.S. at 367-369; *id.* at 368 ("Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority.").

b. The *Massachusetts* test provides that assessments constitute valid user fees "so long as they (1) do not discriminate against [the constitutionally-protected

interest], (2) are based upon some fair approximation of use, and (3) are not shown to be excessive in relation to the cost to the government of the benefits conferred." 435 U.S. at 464. The court of appeals correctly found that the Harbor Maintenance Tax, as applied to imports, satisfies each prong of the test, Pet. App. 9a-14a, and its fact-bound resolution of that question does not merit review.

There is no merit to petitioner's contention (Pet. 20-23) that the court of appeals erred in applying the second prong of the *Massachusetts* framework. This Court has held that the second prong is satisfied if the charges "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972).

The court of appeals correctly found that, although the HMT's *ad valorem* charge is "imperfect in its application, Congress rationally determined that value was 'the only acceptable basis on which to impose such charges. The national uniform basis minimizes any possible disadvantages among cargo types and U.S. ports which otherwise might result from user charges.'" Pet. App. 12a (quoting H.R. Rep. No. 228, 99th Cong., 1st Sess. 5-6 (1985)). The court explained, based on the HMT's legislative history, that "Congress carefully considered the basis for the charge, hearing much testimony in favor of an *ad valorem* charge over a port-specific fee or a flat tonnage fee," and that Congress "viewed the *ad valorem* basis as one that would minimize administrative costs associated with collection." Pet. App. 12a (citations omitted). Moreover, "the imperfections urged to be fatal here are no more severe than those attached to other [*ad valorem*] charges * * * upheld [by this] Court" outside the context of the

Export Clause. *Id.* at 12a-13a (citing *United States* v. *Sperry Corp.*, 493 U.S. 52, 59-64 (1989); *Massachusetts*, 435 U.S. at 467-470; *Evansville-Vanderburgh Airport*, 405 U.S. at 717-720; *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950)).[8]

Petitioner also errs (Pet. 19) in claiming that the court of appeals incorrectly found under the third prong of the *Massachusetts* test that HMT collections are not excessive in relation to the cost of the federal services and benefits. HMT collections are deposited in a designated trust fund, and can be used only for the operation and maintenance of harbors and channels. 26 U.S.C. 9505(a) and (c). In upholding other charges as user fees, this Court has noted that the fees were deposited in a dedicated trust fund to cover only the expense of government facilities or services. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 596 (1884); *Morgan's S.S. Co.* v. *Louisiana Bd. of Health*, 118 U.S. 455, 461 (1886). And although the HMT's designated fund has carried a surplus (Pet. 19), the fact that HMT fees can be used only to pay for specific, related purposes demonstrates that the HMT lacks the characteristics of a general revenue-raising tax. Moreover, in view of the long-term "nature of the problem the HMT addresses,

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[8] See *Massachusetts*, 435 U.S. at 467-470 ("A probable deficiency in the formula [devised by Congress] arises because not all aircraft make equal use of the federal navigational facilities or the airports that have been planned or constructed with federal assistance. But the present scheme (including a fee based upon the size and type of aircraft rather than actual use) nevertheless is a fair approximation of the cost of the benefits each aircraft receives."); *Capitol Greyhound*, 399 U.S. at 545 (user fee "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted").

it seems inconsequential and almost unavoidable that the HMT pays for future programs." Pet. App. 13a.

c. In any event, even if the HMT, as applied to imports, constituted a tax subject to the Uniformity Clause, the result below would not change. As the Court of International Trade correctly concluded (Pet. App. 24a-32a), the HMT's application to imports does not violate the Uniformity Clause's requirements.

"The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems." *United States* v. *Ptasynski*, 462 U.S. 74, 84 (1983). The Clause was intended to prevent "the national government [from] us[ing] its power over commerce to the disadvantage of *particular States*." *Id.* at 81 (emphasis added). In a case involving assessments at ports, the prohibition of the Uniformity Clause against discrimination in favor of (or against) particular States mirrors the prohibitions of the Port Preference Clause. See *Knowlton* v. *Moore*, 178 U.S. 41, 106 (1900) ("[T]he preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."). See also *Ptasynski*, 462 U.S. at 81 n.10. Petitioner thus treats the two Clauses as entailing parallel prohibitions. See Pet. 23-28. Accordingly, the HMT as applied to imports is valid under the Uniformity Clause for the same reasons that it is valid under the Port Preference Clause. See pp. 18-23, *infra*.

3. Petitioner argues (Pet. 23-30) that the HMT's provisions, as applied to imports, entail an invalid preference for the ports of certain States in violation of the Port Preference Clause. The court of appeals correctly rejected that claim.

The Port Preference Clause provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const. Art. I, § 9, Cl. 6. The Clause "has never been relied upon by the federal judiciary to hold an act of Congress unconstitutional." *Kansas* v. *United States*, 16 F.3d 436, 439 (D.C. Cir.), cert. denied, 513 U.S. 945 (1994). As this Court has established, "what is forbidden" by the Clause is "not discrimination between individual ports within the same or different States, but discrimination *between States.*" *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855) (emphasis added). The Court has also made clear that the Clause imposes no bar against a facially non-discriminatory law that has incidental, disparate effects on ports of one or more States. See, *e.g.*, *id.* at 433-436; *Armour Packing Co.* v. *United States*, 209 U.S. 56, 80 (1908); *Louisiana Pub. Serv. Comm'n* v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

Petitioner argues (Pet. 25-27) that the HMT, as applied to imports, violates the Port Preference Clause because of the exemptions for inland waterways, for a portion of the Columbia River, and for domestic shipments between the continental United States and Alaska, Hawaii, and United States territories. See p. 4, *supra*. The exemptions for inland waterways and for a stretch of the Columbia River do not constitute "discrimination between States." *Wheeling*, 59 U.S. (18 How.) at 435. Any discriminatory effect on particular States is incidental, and the provisions therefore do not infringe the Port Preference Clause. See Pet. App. 14a n.5, 36a-37a. Cf. *Head Money Cases*, 112 U.S. 580 (1884) (upholding, under Uniformity Clause, tax assessed against persons who immigrated through ports

but not against persons who immigrated at inland cities).

The exemption for domestic shipments between the continental United States and Alaska, Hawaii, and United States territories, likewise does not violate the Port Preference Clause. There is no indication that the exemption was intended as an illicit preference for the States of Alaska and Hawaii (and United States territories) over other States. To the contrary, "Congress crafted a narrow exemption to alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic shipping," due to their "vast geographic separation" from the continental United States. Pet. App. 16a-17a. Alaska and Hawaii thus enjoy no exemption from the HMT with respect to *international* shipments passing through their ports. See 26 U.S.C. 4462(b)(1). Moreover, the fact that the exemption encompasses United States possessions as well as Alaska and Hawaii confirms that it is grounded in concerns about the burdens of geographic separation rather than an invalid preference for the ports of specific States.

Indeed, the exemption applies not just to ports in Alaska and Hawaii when receiving shipments from the continental United States, but also to ports in *any* State when receiving shipments from Alaska and Hawaii. 26 U.S.C. 4462(b)(1)(A)-(C). Because all ports in all States are exempt from the HMT with respect to the unloading of domestic cargo (other than Alaskan crude oil) shipped to or from Alaska and Hawaii, the exemption is not one for the ports of Alaska and Hawaii alone, but instead is one for a certain class of merchandise, wherever the associated port use occurs. That the exemption may incidentally benefit the ports of certain States (Alaska, Hawaii, and other States where domestic con-

sumables subject to the exemption are unloaded) does not infringe the Port Preference Clause. See *Armour*, 209 U.S. at 80; *Louisiana Pub. Serv. Comm'n*, 284 U.S. at 131. In short, it "is clear that the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions." Pet. App. 17a-18a.

That analysis is supported by this Court's decision in *Ptasynski*, 462 U.S. at 74. There, the Court upheld under the Uniformity Clause a provision exempting certain oil produced in Alaska from the coverage of a general tax on crude oil. The Court explained that the Clause does not "prohibit all geographically defined classifications" and "does not prohibit [Congress] from considering geographically isolated problems." *Id.* at 84. The Court upheld the exemption for certain oil produced in Alaska because of "the disproportionate costs and difficulties * * * associated with extracting oil from this region." *Id.* at 85. The Court explained that "[n]othing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States." *Id.* at 86. In this case, likewise, the HMT's exemption for domestic shipments to and from Alaska and Hawaii addresses "geographically isolated problems" (*id.* at 84) rather than manifesting an "undue preference at the expense of other" States (*id.* at 86). See *City of Houston* v. *FAA*, 679 F.2d 1184, 1197 (5th Cir. 1982) ("Government actions do not violate the [Port Preference] Clause even if they result in some detriment to the port of a state, where they occur * * * more as a

result of the accident of geography than from an intentional government preference.").

The domestic cargo exemption related to Alaska and Hawaii (and United States territories) thus is a far cry from the "paradigm evil the [Port Preference] Clause was explicitly designed to prevent"—"a federal law requiring ships sailing to Baltimore to first enter and clear at Norfolk." *Kansas*, 16 F.3d at 439; see *United States* v. *Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., concurring) ("Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the [Port Preference] Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports."). In view of the geographic isolation of Alaska and Hawaii, it is "difficult to imagine domestic shippers deliberately routing cargo to a port in Alaska or Hawaii as an intermediate stop * * * in order to avoid HMT liability." Pet. App. 18a. It therefore "is hard to view this exemption as one that will channel commerce through the ports of one state to the detriment of the ports in other states." *Ibid.*

Finally, there is no merit to petitioner's suggestion (Pet. 29) that the court of appeals' approach to the Port Preference Clause conflicts with decisions of other courts of appeals. As a threshold matter, there could be no concrete conflict, because no decision—including the decisions identified by petitioner—has invalidated a law under the Port Preference Clause. Moreover, the isolated phrases culled by petitioner from opinions of the Fifth, Seventh, and D.C. Circuits in no way indicate that those courts of appeals would reach a different conclusion in this case. Indeed, contrary to petitioner's suggestion (*ibid.*) that language in the Fifth Circuit's decision in *Houston* (679 F.2d at 1197-1198) is in tension

with the court of appeals' approach in this case, the court of appeals specifically relied on *Houston* in its opinion. Pet. App. 15a-16a.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner also relies (Pet. 29-30) on the D.C. Circuit's opinion in *Kansas*, but that opinion indicates that the "paradigm evil" addressed by the Port Preference Clause is a requirement that ships sail through the ports of specific, favored States before proceeding to other states. See 16 F.3d at 439. The domestic cargo exception for Alaska and Hawaii (and United States territories), as explained, embodies no such preference. Nor does the opinion below conflict (Pet. 29) with the Seventh Circuit's opinion in *City of Milwaukee* v. *Yeutter*, 877 F.2d 540 (1989). That decision rejects a challenge under the Port Preference Clause on the ground that a statute that incidentally benefits the ports of certain states does not infringe the Clause. See *id.* at 545.

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No. 03-882

IN THE
Supreme Court of the United States

THOMSON INC.,
F/K/A THOMSON MULTIMEDIA INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's opposition does not contest the commercial significance of levying an import-only Harbor Maintenance Tax, the constitutional importance of this Court deciding the circumstances when Congress can single out States for exemptions under the Uniformity and Port Preference Clauses, or the international ramifications of an intermediate federal court decision causing the United States to be in violation of its international trade obligations. Instead, the government intimates that petitioner seeks only error correction of the Federal Circuit's decision. But where that court holds exclusive jurisdiction over a subject matter, as it does here, there is no possibility of a square conflict among the circuits. This Court should not permit the Federal Circuit, through its exclusive jurisdiction over challenges to the Harbor Maintenance Tax, to insulate itself from review of decisions that sanction unconstitutional exactions of hundreds of millions of dollars in taxes each year.

I. THE FEDERAL CIRCUIT'S SEVERABILITY HOLDING WARRANTS REVIEW

The government's analysis of severability omits discussion of Congress's intent, which is the touchstone of whether a provision appended to an unconstitutional enactment can survive. As the petition demonstrates, Congress would not have enacted an import-only Harbor Maintenance Tax for three basic reasons: (1) Congress sought to minimize "disadvantages among cargo types *and U.S. ports*." S. Rep. No. 99-228, at 5-6 (1986) (emphasis added). Because certain ports concentrate on certain types of traffic – *i.e.*, bulk cargo (exports) versus containerized cargo (imports) – Congress sought to tax *both* imports *and* exports. *See* Pet. 10. (2) Congress specifically recognized that a tax on imports alone would cause the United States to be in violation of its international trade obligations under GATT whereas a fee on imports and exports alike would not raise similar concerns of protectionism. *See* Pet. 11. (3) The compromise reached over

the precise form of the Harbor Maintenance Tax was crucial to enactment of the WRDA. *See* Pet. 11-12. The legislative history decisively rejects the government's thesis – the Tax was not simply a revenue measure, but rather a means of raising money in a bill that involved a delicate compromise between importing and exporting interests.[1] Congress therefore never would have enacted an import-only HMT, but instead would have enacted an alternative revenue-raising measure that, like the HMT, applied to both imports and exports. *See* Pet. 13.

The government does not contest those points, choosing instead to focus on arguments that are neither germane nor persuasive. First, the government rests on the severability clause of 33 U.S.C. § 2304. But for *eight decades* this Court has consistently held that this precise language – boilerplate used in numerous statutes – is insufficient by itself to justify severing an unconstitutional provision where all other indications of intent demonstrate that Congress would not have enacted the statute that remains without the unconstitutional provision. *See* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 117-18 (1937) (collecting cases and noting that "it is apparent that the clause has not proved a successful means of making judicial determinations of matters of separability subject to legislative control"). *See, e.g., Dorchy v. Kansas*, 264 U.S.

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[1] The government cites (Opp. 12) as "evidence" of its contrary view of congressional intent the "additional views" of Congressman Foglietta (H.R. Rep. No. 99-251, Pt. 4, at 42 (1985)). That statement by a single representative who opposed the HMT and who served on a committee without any actual jurisdiction over the Tax is of dubious value at best. Moreover, it does not even support the government's position, because Congressman Foglietta made clear that the HMT "is only agreed upon in an attempt to break the long-standing impasse on the omnibus water resources bill and only as a last resort." *Id.* Likewise, the government's citation (Opp. 2) of S. Rep. No. 99-126 (1985) is unavailing, because that passage is at best nondescript on the question whether Congress was concerned solely with raising money or with raising money by sharing the burden among importers and exporters.

286, 290 (1924) (identically worded separability clause held to be "an aid merely" in determining congressional intent and "not an inexorable command").

Clauses identical to the one in Section 2304 have long been held not to carry the heavy weight assigned by the government. Decades ago the Court held that a provision purporting to confer power on a board to fix gasoline prices could not be severed from the rest of the statute creating the board and performing other functions notwithstanding the existence of a separability clause identical to the one at issue here. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929). As Stern explained, "[t]he more such clauses came to be attached as a matter of course to all statutes without thought as to what their effect would be, the more the courts came to treat them as the formal appendages which they often were." Stern, 51 Harv. L. Rev. at 124. Without recognizing that its position has long since been rejected by this Court, the government would disregard clear congressional intent to treat collections of the Tax on imports and exports the same way by basing its argument predominantly on language that is a "formal appendage[]" to the WRDA. *See also* Pet. 13-14 (collecting cases where this Court has rejected severability notwithstanding existence of identical or similar separability clause).

Second, the government repeatedly relies on the Federal Circuit's prior decision in *Carnival Cruise Lines* and this Court's denial of a certiorari petition in that case. Opp. 8-13. The government, however, never addresses the unassailable points that: (1) the Federal Circuit in *Carnival Cruise Lines* did not have to address the evidence of legislative intent presented in this petition showing that Congress never intended for there to be an import-only Harbor Maintenance Tax; (2) it would have been anomalous for the Federal Circuit to consider that history in *Carnival Cruise Lines* because that case considered the application of the Harbor Maintenance Tax to cruise passengers only; and (3) collections of the HMT on

cruise passengers raise only an infinitesimal amount of tax revenue, so the commercial stakes at issue in *Carnival Cruise Lines* are dwarfed by this case. Pet. 16 & n.18. Because the certiorari petition in *Carnival Cruise Lines* did not – because it could not – present the severability issue under the HMT in its constitutionally most problematic form, this case presents the last suitable opportunity for the Court to address this important question.

Third, the government's recitation about coal and computer chips simply fails to recognize that those products were stand-ins in the congressional debates for "exporters" (coal) and "importers" (computer chips). Opp. 13. As we explain in the petition (at 10 n.8), the government's position ignores that Congress was concerned about ensuring that the Harbor Maintenance Tax not discriminate between export-dependent and import-dependent *ports*. Yet such discrimination is precisely the effect of imposing a tax that operates predominantly in import-dependent container ports and not in export-reliant bulk cargo ports.[2]

Finally, the government nowhere rebuts that, as a linguistic matter, the unconstitutional export provision cannot be severed from the HMT without *adding* text. *See* Pet. 14-15. The government cites inapposite First Amendment cases for the proposition that unconstitutional *applications* may be considered apart from constitutional ones (Opp. 10), but those cases do not involve statutory language that must be judicially rewritten to save the remainder, a form of judicial activism directly

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[2] Such ports also have different types of machinery and facilities to handle those different types of cargo, which further accentuates the disparity in having post-*United States Shoe* taxation on import-oriented container ports subsidize the repair and construction at export-oriented bulk cargo ports that no longer generate revenue through the HMT but which incur costs unrelated to the needs of containerized ports. It would seem axiomatic that a so-called "user fee" paid in a container port should not be used to repair facilities in a bulk cargo port that handles exports, yet that is the gravamen of the government's theory.

inconsistent with this Court's cases. *See Reno v. ACLU*, 521 U.S. 844, 884-85 (1997). That is true even for the government's theory of "applications" (Opp. 11), because the "application" must be of a "provision" and this Court "held invalid" that *provision* in *United States Shoe*. 33 U.S.C. § 2304. The government offers no support for its contention that Congress meant for its reference to "application" in Section 2304 to authorize the rewriting of the HMT provisions to save the tax on imports, and that interpretation is all the more incongruous in light of this Court's long-standing doctrine to construe statutes to avoid bringing the United States in conflict with its international obligations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see also Amici Curiae* Hitachi High Technologies America, Inc., *et al.* Br. 3-7 (invoking *Charming Betsy* doctrine and explaining why import-only HMT violates GATT).[3] Indeed, the government's suggested partial invalidation of the statute is "improper" where the legislature "would not have passed [the law] had it known the challenged provision was invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506-07 & n.15 (1985); *see also* Pet. 10-13.

II. THE HARBOR MAINTENANCE TAX IS A "TAX" AND NOT A "USER FEE"

The government clings to its untenable position that a levy unanimously found by this Court to be a "tax" on goods departing from America's ports is somehow *not* a tax when applied in exactly the same fashion to goods entering those ports. In making that argument, the

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[3] Even on its own terms, the government's theory founders by focusing on the wrong provisions to excise. *See* Opp. 11 (referencing 26 U.S.C. § 4461(c)(1)(A) and (B)). The provisions defining "port use" do not differentiate between import and export trade. *See* 26 U.S.C. § 4462(a)(1); Pet. 15 n.15. Thus, to adopt either of the government's theories of what to excise from the text or how to apply that text to imports would require the addition of words to the definition of port use.

government ignores most of the analysis of *United States Shoe* and instead focuses on a few sentences in the Court's opinion that are taken out of context.

The Court's purpose in *United States Shoe* of invoking *Pace v. Burgess*, 92 U.S. 372 (1876), was not to suggest that the very same tax – applied in the same manner to exports and imports alike – would change like a chameleon from a "tax" subject to constitutional scrutiny if the goods were exported into a "user fee" not subject to constitutional strictures if applied to imports. *Pace* did not address the situation presented here.

Indeed, none of the cases from this Court relied on by the government addresses a situation like the HMT, where a levy definitively found by this Court to be a "tax" under one constitutional provision is asserted not to be a "tax" under a different provision even though that charge applies in exactly the same way to imported and exported goods. As the petition explains (at 19-20), the Federal Circuit's (and the government's) position leads to the absurd result that a "tax" under one constitutional provision cannot be a subset of "tax" (an "excise") under a different constitutional provision. The government appears expressly to sanction that type of *ad hoc* constitutional analysis, which obviously has enormous interpretive consequences. Yet in making that argument – the sole purpose of which is to justify its collection of $500 million annually in taxes – the government ignores that the Harbor Maintenance Tax is explicitly denominated a "tax" in the statute and is codified as an excise tax in the Internal Revenue Code, both clear signals that the charge in fact is a "tax." *United States Shoe*, 523 U.S. at 367.

Finally, under either *United States Shoe* or the *Massachusetts* test, the government does not dispute that the Harbor Maintenance Tax bears no relation at all between the port services used and the fee imposed by the HMT – indeed, the government offers no response on that critical question. This Court stressed that the absence of any "fair approximation" between the charge and the uses to

which it was put is a clear sign that the levy is a "tax" and not a "user fee." 523 U.S. at 369 ("The value of export cargo . . . does not correlate reliably with the federal harbor services used or usable by the exporter."). On that basis alone, the HMT fails even the *Massachusetts* test. *See* Pet. 18-19, 20-22.

In addition, the revenue collected from the Tax is not fairly apportioned to the total cost to the government of the benefits conferred, which is dramatically demonstrated by the huge surpluses that are being accumulated in the HMT account for charges on imports. The government is not spending the *nearly two billion dollar* surplus that it has accumulated, and it offers no justification for the discriminatory impact the tax imposes on imported goods now that the tax on exports is no longer valid. No case from this Court has ever sanctioned such a broad disparity between the charge levied and the ostensible uses as a valid "user fee." Pet. 19.

The government claims, however, that a charge based on the value of the goods was purportedly necessary because of administrative convenience. Opp. 16. But expediency has never been a basis under either *United States Shoe* or the *Massachusetts* test for redefining a levy as a "user fee" as opposed to a "tax." *See* Pet. 21-22 (collecting cases) & n.23 (explaining Federal Circuit's inconsistency on this point). If it could, Congress would be empowered to enact unconstitutional taxes that escape critical scrutiny simply under the guise of being more "convenient" to impose. In rationalizing such a result, the Federal Circuit has simply flouted this Court's clear directive in *United States Shoe*. The issue of Congress's power – and the Executive Branch's authority – to transform unconstitutional taxes into collectible "user fees" is of paramount importance warranting this Court's review.

III. THE TAX VIOLATES THE UNIFORMITY AND PORT PREFERENCE CLAUSES

In defending the naked preferences imposed by Congress, the government simply ignores this Court's decision

in *Downes v. Bidwell*, 182 U.S. 244 (1901), which determined that a duty on goods from Puerto Rico would have violated the Uniformity and Port Preference Clauses if Puerto Rico were a State. The tax survived scrutiny not because the discrimination was held valid, but rather because the Court determined that Congress could treat Territories differently from States. *See* Pet. 24 n.25. If the same ruling were applied to the preferences made in the HMT, the Tax unquestionably would be unconstitutional. The government's position – that those constitutional clauses essentially have no teeth – should be rejected. Opp. 22. Simply because Congress has never before attempted to enact a tax as sweeping in its naked preferences for certain ports of States (as opposed to the Territory at issue in *Downes*) does not mean the Harbor Maintenance Tax should escape invalidation. *See also Amicus Curiae* American Ass'n of Exporters and Importers Br. 9-17.

The government never denies that the preferences contained in the HMT are discriminatory, but rather seeks to deflect the consequences of such discrimination by calling it "incidental" (Opp. 19) or "grounded in concerns about the burdens of geographic separation" (Opp. 20). Those contentions, of course, ignore the clear constitutional commands that "*all* Duties, Imposts and Excises shall be uniform throughout the United States," U.S. Const. art. I, § 8, cl. 1 (emphasis added), and that "*No* Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another," *id.*, art. I, § 9, cl. 6 (emphasis added). The government cites no case in which Congress has enacted a naked geographical preference specifically denominating the ports of particular States for protection and in which a court upheld that preference as "incidental" or justified by other interests.[4]

---

[4] As the petition explains (at 25), the exclusion of the windfall profits tax upheld by this Court in *Ptasynski* provides no support for the holding below. Unlike the exclusion of the HMT for *all* traded goods within their applicable class in Alaska, Hawaii, parts of the Columbia

The government seeks to distinguish court of appeals cases that have articulated an approach inconsistent with that taken by the Federal Circuit, but the crucial fact in those cases was that Congress was careful *not* to enact an express preference. Rather, in each case, Congress imposed a rule that produced incidental benefits without an express geographical preference specifically favoring ports of a State in the same manner as the Harbor Maintenance Tax. *See Kansas v. United States*, 16 F.3d 436, 439 (D.C. Cir. 1994); *City of Milwaukee v. Yeutter*, 877 F.2d 540, 545 (7th Cir. 1989); *City of Houston v. FAA*, 679 F.2d 1184, 1197-98 (5th Cir. 1982). Those circuits left no doubt that there is a constitutional difference between an express preference of the type contained in the Harbor Maintenance Tax and an incidental benefit that may accrue from the geographical consequences of a tax. *But see* Opp. 22-23 & n.9 (asserting no conflict). The latter does not give rise to the constitutional difficulties of the former. The uncertainty occasioned by the disagreement in fundamental approach of four circuits, therefore, in addition to the Federal Circuit's exclusive jurisdiction over challenges to the HMT, necessitates this Court's review.

River, and other inland waterways, as Congress enacted here, the Court explained the exclusion of windfall profits in *Ptasynski* on the basis that the central problem that Congress was addressing – windfall profits from oil – simply did not exist with respect to the production of oil in pertinent parts of Alaska. 462 U.S. at 85-86. Congress is certainly entitled to make such a legislative finding, as this Court found. *Id.* at 86. Whereas the legislative history of the windfall profits tax at issue in *Ptasynski* showed no effort by Congress to create a geographical preference, *see* Pet. 25 n.27, here problems associated with port use do exist in the locations Congress exempted from the tax. Indeed, under the government's own explanation – "concerns about the burdens of geographic separation" (Opp. 20) – problems with port use are if anything *greater* in the very States afforded the naked preference. Yet the Constitution expressly forbids Congress from favoring the ports of some States against those of other States. That Congress can ameliorate perceived geographical difficulties of those States by taking actions that would be constitutional (*i.e.*, appropriations) cannot mask the unconstitutional choice Congress made in the HMT. *See* Pet. 26 n.28.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

CF INDUSTRIES, INC., *Petitioner v.* UNITED STATES OF AMERICA, *Respondent*

AND

THOMSON INC., F/K/A THOMSON MULTIMEDIA INC., *Petitioner, v.* UNITED STATES OF AMERICA, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* HITACHI HIGH TECHNOLOGIES AMERICA, INC., THE MARKETING STORE WORLDWIDE, L.P., AND TEAC AMERICA, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Hitachi High Technologies America, Inc., The Marketing Store Worldwide, L.P., and TEAC America, Inc., *amici curiae* in this appeal, respectfully submit this brief in support of CF Industries, Inc. and Thomson Inc. Both petitioners and the respondent have consented in writing to the filing of this brief.

Hitachi High Technologies America, Inc. of Schaumburg, Illinois, is an importer of semiconductor manufacturing equipment, analytical instrumentation, scientific instruments, bio-related products, industrial equipment, information equipment, electronic devices, and electronic and industrial materials.

The Marketing Store Worldwide, L.P. of Oakbrook Terrace, Illinois, is a large volume importer that provides promotion and marketing services to multinational corporations.

Finally, TEAC America, Inc. of Montebello, California, an importer of advanced recording equipment, is the largest subsidiary of Tokyo-based TEAC Corporation, a billion-dollar global corporation and a world leader in recording technology for over four decades.

As significant U.S. importers who have paid several million dollars in Harbor Maintenance Taxes ("HMT"), *amici curiae* have an interest in the outcome of this appeal. *Amici curiae* agree with petitioners that the unconstitutional

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[1] Pursuant to S. Ct. Rule 37.6, *amici curiae* state that no counsel for any party to this case authored this brief in whole or in part and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

HMT's export provisions are not severable from the statute's import provisions.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case contained in CF Industries, Inc.'s and Thomson Inc.'s Petitions for *Writs of Certiorari*.

SUMMARY OF ARGUMENT

A long-standing canon of statutory construction known as the *Charming Betsy* doctrine provides that an interpretation of a statute which violates the United States' international obligations is to be avoided. In this instance, there is little dispute that the HMT (26 U.S.C. § 4461), in its current form, violates the United States' commitments under the General Agreement on Tariffs and Trade 1947 ("GATT"). Given this prohibition, in order for the Court to uphold the HMT, it must determine that Congress expressed a clear intent to enact the HMT knowing the statute would conflict with the United States' international obligations.

Review of the legislative history to the HMT shows that there is no clear expression of Congress' intent to enact a GATT-inconsistent statute. The Court should therefore presume, based on the *Charming Betsy* doctrine, that Congress would not have enacted the HMT had it known that the statute would violate U.S. GATT obligations. The HMT's export provisions are therefore not severable from the statute's import provisions.[2]

---

[2] Although *amici* address just Question 1 presented in Thomson Inc.'s petition for a *writ of certiorari*, we agree with both petitioners that the HMT is a "tax" and not a user fee and therefore unconstitutional under the Uniformity and Port Preference Clauses of the U.S. Constitution. *See* Thomson Pet. at 16-30; CF Indus. Pet. at 8-29.

ARGUMENT

I. THE "CHARMING BETSY" DOCTRINE PROVIDES THAT AN INTERPRETATION AND APPLICATION OF A STATUTE WHICH WOULD RESULT IN A VIOLATION OF THE UNITED STATES' INTERNATIONAL OBLIGATIONS IS TO BE AVOIDED.

From nearly its inception, this Court has recognized that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Otherwise known as the *Charming Betsy* doctrine, this principle of statutory interpretation serves as the basis for the presumption that "Congress does not intend to repudiate an international obligation of the United States . . . by nullifying . . . an international agreement . . . or making it impossible for the United States to carry out is obligations." Restatement (Third) Foreign Relations Law of the United States, at 64 (1987) (emphasis added).

As discussed in detail in Petitioner Thomson Inc.'s Petition for *Writ of Certiorari*, a primary issue before this Court is "[w]hether the export provisions of the HMT, which this Court held unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), are not severable from the statute's import provisions, which Congress enacted together with the export provisions as part of a legislative compromise." Importantly, "whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526

U.S. 172, 191 (1999) (emphasis added) citing *Regan v. Time Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion).

As this Court has recognized, "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (italics original; underscoring added). The sole question before this Court on the issue of severability is, therefore, whether, in the context of the *Charming Betsy* doctrine, the HMT statute created in the absence of the export provisions is legislation that Congress would not have enacted. Because there is no clear expression of Congressional intent to enact a GATT-inconsistent HMT statute, the *Charming Betsy* doctrine counsels the Court to conclude that the unconstitutional provisions are not severable.

II. AS A TAX ON IMPORTS, THE HMT VIOLATES THE UNITED STATES' COMMITMENTS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1947).

Although the U.S. Court of Appeals for the Federal Circuit held that the HMT was a "user fee," this Court has held that "Congress expressly describe [the HMT] as 'a *tax* on any port use.'" *United States Shoe*, 523 U.S. at 367 (emphasis added) (quoting 26 U.S.C. § 4461(a)). In addition, in enacting the HMT, Congress consistently referred to, and thereby recognized, the HMT as a "tax."

For example, the Senate Environment & Public Works Committee Report states that the Senate version of the Water Resources Development Act (the legislative vehicle for the HMT) assessed a "cargo tax:"

> The bill sets this cargo tax on the value of the commercial cargo loaded or unloaded. The tax in Title 8 is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and it is to be paid by the owner of the cargo, or his agent.

S. Rep. 99-126, at 9 (1985).

Similarly, the House Conference Report also refers to imposition of a "port use tax:"

> Imposition of tax. -- The House bill imposes an excise tax on the use of a U.S. harbor or channel ("port") by a commercial vessel for loading or unloading of commercial cargo.
>
> Applicability of tax. -- The port use tax does not apply with respect to:
>
> * * *
>
> Payment of tax. -- The tax is payable by the . . . importer . . . . The tax is imposed only once with respect to transportation of any cargo on the same vessel.
>
> Administration of tax. -- The port use tax is to be administered and enforced by the

> U.S. Customs Service in a manner similar to customs duties.

H. Conf. Rep. 99-1013, at 228-230 (1986); *See*, S. Rep. 99-126 at 9-10, 129, 131, 133, 135 (1986) (describing HMT as tax); H.R. Rep. 99-228, at 228-31 (1986); H.R. Rep. 99-251, at 1-4, 7-14 (1985); S. Rep. 99-126, at 2-4, 9-10, 115, 129, 133 (1985).

GATT Article VIII:1(a) specifically provides that "fees and charges . . . shall not represent . . . a taxation on imports." In addition, although GATT Article II:2(c) permits the assessment on imports of "fees or other charges," such fees or charges must be "commensurate with the cost of services rendered." This Court has recognized, however, that "Congress expressly described [the HMT] as 'a *tax* on any port use . . . ." *United States Shoe*, 523 U.S. at 367 (emphasis added) (quoting 26 U.S.C. § 4461(a)). In addition, this Court held that "the tax . . . is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee." *United States Shoe*, 523 U.S. at 363.

Furthermore, several countries, led by the European Union, have requested GATT consultations with the United States to discuss the United States' HMT-related violation of GATT Articles I, II, III, VIII, and X. *See* Request for Consultations, *United States-Harbor Maintenance Tax*, DS118 (W.T.O. Feb. 6, 1998) and European Comm'n, *Report on United States Barriers to Trade and Investment – 2002* (Nov. 2002). In addition, subsequent to this Court's ruling in *United States Shoe*, the Clinton administration transmitted to Congress a proposal to replace the HMT with a Harbor Services Fee. *See Hearing on the Admin.'s Harbor Service Fee Proposal and Harbor Services Fund Proposal Before the House Subcomm. on Water Resources & Envn't,*

of the Committee on Transportation and Infrastructure, 106th Cong. 44 (1999) (statement of Dr. Joseph W. Westphal, Asst. Sec. of the Army (Civil Works)) (acknowledging that, after this Court's decision in *United States Shoe*, "GATT has a serious problem with [the HMT] . . . [which] is now only being applied to imports."). Accordingly, the HMT as a tax on imports, subsequent to this Court's holding that the HMT was unconstitutional as applied to exports, violates the United States' GATT commitments.

III. THERE IS NO CLEAR EXPRESSION OF CONGRESS' INTENT TO ENACT A GATT-INCONSISTENT HMT. THE COURT SHOULD THEREFORE PRESUME THAT CONGRESS WOULD NOT HAVE ENACTED THE HMT IN VIOLATION OF THE UNITED STATES' GATT OBLIGATIONS AND, THEREBY, HOLD THAT THE HMT ON EXPORTS IS NOT SEVERABLE.

As discussed above, the sole question before the Court on the issue of severability is whether the HMT statute created in the absence of the HMT on exports is legislation that Congress would not have enacted. In answering this question, it is essential to first recognize that "some affirmative expression of congressional intent to abrogate the United States' international obligations is required . . . ." *Weinberger v. Rossi*, 56 U.S. 25, 32 (1982). "What is essential is clear evidence that Congress actually . . . intended action on the one hand and [] treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-740 (1986). *See also*, *Fundicao Tupy S.A. v. United States*, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987) ("An interpretation and application of the statute which would

conflict with the GATT Codes would clearly violate the intent of Congress."); *Federal Mogul Corp. v. United* States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) ("GATT Agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.") (emphasis added).[3]

Upon review of the legislative history to the HMT, there is no clear expression by Congress that it would have implemented the HMT statute knowing that the statute would conflict with the United States' GATT obligations. Rather, the legislative history indicates that Congress enacted the HMT statute in its original form to specifically avoid a conflict with GATT obligations.

For example, a report issued by the House Merchant Marine and Fisheries Committee recognized a possible conflict with the United States' GATT commitments by noting that "if the proposed levy is construed to be a revenue-raising measure, there is the possibility of either a GATT claim or the threat of retaliation by individual trading partners." H.R. Rep. No. 99-251 (1985). In addition, a witness testifying before the House Ways and Means Committee stated that "imposing [the HMT] only on imports would present significant GATT problems, and for that reason alone it was decided to impose the [HMT] on both exports and imports and on movement on the inland waterways." *Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985*: Hearing

[3] It is important to recognize that a successful challenge of the HMT under the GATT could result in the assessment of "retaliatory" duties on U.S. origin products, which would severely weaken the international competitiveness of U.S. exporters.

Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 31, at 37 (1985).

In contrast, the U.S. Court of International Trade believes "the issue is not whether an HMT on imports alone violates the GATT, but whether Congress was so fearful of negative GATT implications that it would not have enacted the HMT on imports without the HMT on exports." *Amoco Oil Company v. United States*, 63 F. Supp. 2d 1332, 1337 (Ct. Int'l Trade 1999). As the basis for this decision, the Court of International Trade correctly recognized that Congress possesses the authority to pass laws which conflict with the United States' international obligations. *Id.* However, what the Court failed to recognize is that the *Charming Betsy* doctrine provides that "an act of Congress ought never to be construed to violate the law of nations" and, therefore, "absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations." *Federal Mogul Corp. v. United* States, 63 F.3d 1572, 1581.

The test to be applied is, therefore, not whether Congress was "fearful of negative GATT implications." Rather, the test is whether the HMT on imports conflicts with the United States' international obligations and, if so, whether there was a clear expression of Congressional intent to enact the HMT on imports with the knowledge that the statute would conflict with these international obligations.

As established above, the HMT on imports does, in fact, conflict with the United States' international obligations. In addition, there is no clear expression by Congress of its intent to enact the HMT on imports with the knowledge that the statute would conflict with the United States' international obligations. Indeed, as the legislative history discussed above indicates, Congress carefully crafted the

HMT to *avoid* any conflict with GATT, by making it applicable to exports and imports alike. The HMT on exports is, therefore, not severable. Accordingly, the Court should hold that the U.S. Court of Appeals for the Federal Circuit's decision on severability, which relied heavily on the Court of International Trade's decision in *Amoco Oil Company*, was in error. *See Thomson Multimedia Inc. v. United States*, 340 F.3d 1355 (Fed. Cir. 2003).

CONCLUSION

For the reasons stated above, *amici curiae* Hitachi High Technologies America, Inc., The Marketing Store Worldwide, L.P., and TEAC America, Inc. respectfully request that the petition of CF Industries, Inc. and Thomson Inc. be granted.

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v.

UNITED STATES OF AMERICA,

Respondent.

THOMSON INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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INTEREST OF AMICUS CURIAE

This brief is filed by the American Association of Exporters and Importers ("AAEI") as amicus curiae in support of the petitions for writs of certiorari filed by Thomson Inc. and CF Industries, Inc.[1]

Founded in 1921, AAEI is a national association of over 1,000 U.S. firms that export, import, distribute, and manufacture a broad range of products, including chemicals, electronics, machinery, footwear, automobiles and automobile parts, food, household consumer goods, toys, specialty items, textiles, and apparel. AAEI's membership also includes many organizations serving the international trade community, including customs brokers, freight forwarders, banks, attorneys, insurance firms, and carriers.

AAEI is often called upon by Congressional committees to offer its technical expertise on policy and regulatory matters impacting global commerce. The association and its members have an abiding interest in U.S. laws affecting international trade and their adherence to the Constitution. These cases are significant for AAEI because its membership includes companies that have paid Harbor Maintenance Taxes in connection with imports into the United States and/or domestic shipments within the United States, and that have filed lawsuits challenging the constitutionality of such assessments. Those lawsuits are currently pending in the United States Court of International Trade and will be directly affected by the outcome of the *Thomson* and *CF Industries* cases.

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1. Letters from the Petitioners and the Respondent consenting to the filing of this brief accompany this filing. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Federal Circuit's holding that the Harbor Maintenance Tax ("HMT") as applied to imports and domestic shipments is a user fee rather than a tax, and therefore beyond the scope of the Uniformity Clause requirement that all "Duties, Imposts and Excises shall be uniform throughout the United States," cannot be reconciled with this Court's earlier holding that the HMT is, in fact, a tax rather a user fee. *See United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (holding that the HMT is a "tax" on exports that violates the Export Clause of the Constitution, which states, "No Tax or Duty shall be laid on Articles exported from any State").

In *United States Shoe*, this Court recognized that the flexible user fee analysis applicable to implied constitutional limitations on governmental taxing authority, under which an assessment need only be a "fair approximation" of the use of government-provided services in order to qualify as a user fee, does not govern under the Export Clause, which, by virtue of its *express* prohibition against federal taxation of exports, requires that a valid user fee bear a close relationship to the use of government services. This Court held that the HMT as applied to exports is a prohibited tax rather than a valid user fee because it is assessed as a fixed percentage of the value of the cargo shipped, and "[t]he value of export cargo . . . does not correlate reliably with the federal harbor services used or useable by the exporter." 523 U.S. at 369.

The Federal Circuit misinterpreted *United States Shoe* as limiting a strict user fee standard to the Export Clause and endorsing the more permissive "fair approximation" standard for all other constitutional provisions, including the Uniformity Clause. To the contrary, this Court's analysis of the HMT in *United States Shoe* applies equally to other

express restrictions on the federal government's taxing authority, such as the Uniformity Clause. Therefore, the Court should grant the petitions to clarify that the flexible user fee analysis is inapplicable to such express limitations, and that the HMT is indeed a tax.

As a "tax," the HMT is unconstitutional under the Uniformity Clause. The Uniformity Clause requires that a "tax [must] apply, at the same rate, in all portions of the United States where the subject of the tax is found." *United States v. Ptasynski*, 462 U.S. 74, 84 (1983). The subject of the HMT is port use in the United States, which, in turn, is defined as the loading or unloading of commercial cargo from a vessel at a port. However, a variety of HMT exemptions drawn along geographic lines relieve this commercial activity from the tax. These exemptions apply to: (1) domestic cargo unladen in Alaska or Hawaii; (2) all cargo unladen from vessels that are subject to the Inland Waterway Fuel Tax; and (3) all cargo unladen at ports located in inland waterways or along a portion of the Columbia River. As these exemptions allow port use to escape HMT liability, the HMT is unconstitutional under the Uniformity Clause.

The HMT exemptions for domestic cargo unladen in Alaska or Hawaii also run counter to the Port Preference Clause of the Constitution, which states in pertinent part, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ." The Federal Circuit upheld the HMT because it found that these exemptions were not intended to provide a preference to the ports of Alaska and Hawaii at the expense of other States' ports. However, the Federal Circuit's novel incorporation of a subjective intent test into the Port Preference Clause is inconsistent with this Court's precedents, which confirm that naked preferences of the sort provided for in the HMT statute are strictly prohibited.

This Court should grant the certiorari petitions in order to preserve the integrity of the Port Preference Clause, which was vitiated by the Federal Circuit's decision.

Finally, the Court should grant the petitions given the economic significance of the issues to the U.S. importing community. The HMT is assessed on virtually all waterborne imports into this country, involving approximately $500 billion in imported merchandise and resulting in approximately $500 million in HMT collections each year. Review by this Court is warranted to rectify this enormous, unconstitutional exaction from importers.

ARGUMENT

I. THIS COURT'S CONCLUSION IN *UNITED STATES SHOE* THAT THE HMT IS A "TAX" RATHER THAN A "USER FEE" APPLIES EQUALLY TO THE UNIFORMITY CLAUSE.

The Federal Circuit held that the HMT is a user fee rather than a tax, and therefore not subject to the Uniformity Clause of the Constitution, which mandates that all "Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. *See Thomson multimedia Inc. v. United States* and *CF Industries, Inc. v. United States*, 340 F.3d 1355 (Fed. Cir. 2003) ("*Thomson*"). The Federal Circuit's holding is a striking deviation from this Court's determination in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), that the HMT is a tax rather than a user fee, and thus violative of the Export Clause of the Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

The Federal Circuit interpreted *United States Shoe* as limiting, to the Export Clause, a strict standard for determining whether a particular charge is a user fee rather

than a tax, and endorsing a more permissive standard for making that determination in all other constitutional contexts. *See Thomson*, 340 F.3d at 1361 (characterizing *United States Shoe* as having been based on a "different, more stringent standard specific to the Export Clause," and applying "the more flexible *Massachusetts* test" to the Uniformity Clause challenge here).[2]

In doing so, the Federal Circuit fundamentally misinterpreted this Court's decision in *United States Shoe*. Although *United States Shoe* relied upon an earlier Export Clause decision,[3] and distinguished "decisions involv[ing] constitutional provisions other than the Export Clause" which do not expressly limit governmental taxing authority, *id.* at 368, this Court did not suggest that the *Massachusetts* test applies by default everywhere else in the Constitution. Rather, the Court signaled that the applicability of the *Massachusetts* test turns on whether the constitutional provision at issue expressly limits governmental taxing authority. As explained below, because the Uniformity Clause is such an express limitation, the *Massachusetts* test does not apply.

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2. Under the *Massachusetts* test, which this Court formulated in the context of the doctrine of implied State tax immunity, in order to constitute a user fee, a charge must: (1) not discriminate against a constitutionally protected interest; (2) be based upon a "fair approximation" of use; and (3) not be excessive in relation to the cost to the government of the benefits conferred. *Massachusetts v. United States*, 435 U.S. 444 (1978).

3. The Court cited *Pace v. Burgess*, 92 U.S. 372 (1875), as "[t]he guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context." *United States Shoe*, 523 U.S. at 369. *Pace* did not set forth any particular "test" under the Export Clause. Rather, its general analysis "established that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present" in the case of the HMT. 523 U.S. at 369.

In *United States Shoe*, this Court observed that "the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368. The "other constitutional limitations" which the Court addressed, *i.e.*, the Commerce Clause, the doctrine of implied State tax immunity, and the Takings Clause, lack textually express requirements or, in the case of the Takings Clause, only rarely constrain the federal government's taxing power.[4] Because these clauses therefore impose fewer constraints on taxation than the Export Clause, the "'*text* of [which] . . . *expressly* prohibits Congress from laying any tax or duty on exports,'" *id.* (emphasis added) (quoting *IBM*, 517 U.S. at 852), this Court held that the flexible user fee analysis applicable to those constitutional provisions does not govern under the Export Clause. *Id.* at 368-69.

The Uniformity Clause, which mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States," is, like the Export Clause, a clear textual command that directly restricts the general grant of the taxing power to Congress. Indeed, Justice Story, in his *Commentaries on the Constitution of the United States*, noted that without the

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4. As this Court has noted, the Commerce Clause "does not expressly prohibit the States from doing anything"; rather, the "negative implications of the Clause . . . prevent certain state taxation even when Congress has failed to legislate." *United States v. International Bus. Mach. Corp.*, 517 U.S. 843, 851 n.2 (1996) ("*IBM*"). The Takings Clause, though textually express in its requirement that "nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V, only rarely impacts the taxing power of the federal government. *See, e.g.*, *287 Corporate Center Assocs. v. Township of Bridgewater*, 101 F.3d 320, 324 n.5 (3d Cir. 1996) ("levying taxes does not rise to the level of a Fifth Amendment taking unless it was so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property. . . .'") (quoting *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916)).

Uniformity Clause, the "value of most of the *other restrictive clauses* in the constitution" would have been "demolish[ed]." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 954, at 428-29 (Boston, Hilliard, Gray and Company 1833) (emphasis added). Recently, one commentator has observed that given their textual similarities, the Uniformity Clause is as strong a limitation on the taxing power as the Export Clause. *See* Eric M. Jensen, *The Export Clause*, 6 Fla. Tax Rev. 1, 72-73 (2003) (comparing the unqualified prohibition of the Export Clause to the Uniformity Clause, which "absolutely prohibits duties, imposts and excises that aren't uniform.").

Given the textual similarities of the Export Clause and the Uniformity Clause, *United States Shoe*'s rejection of the *Massachusetts* "fair approximation" test applies equally to the cases at bar. Thus, the same close relationship between the HMT and the government's harbor maintenance services that was required, but lacking, under the Export Clause in *United States Shoe* is required, but lacking, under the Uniformity Clause. Therefore, *United States Shoe's* holding that the HMT is a "tax" governs the cases at bar.

Just as the HMT imposed on exports was "determined entirely on an ad valorem basis" rather than based on factors reflecting the actual extent and manner of port use, "such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging," *United States Shoe*, 523 U.S. at 369, the HMT is imposed ad valorem on imports and domestic shipments. And, just as "[t]he value of the export cargo . . . does not correlate reliably with the federal harbor services used or useable by the exporter," *id.*, the value of imported or domestically-shipped cargo does not correlate reliably with the cost or value of the harbor services used or useable by companies that import or ship domestically. Notably, the Federal Circuit did not suggest that the harbor services used

by importers or domestic shippers differ from the harbor services used by exporters. Therefore, this Court's conclusion in *United States Shoe* that the HMT does not "fairly match the exporters' use of port services and facilities," 523 U.S. at 370, necessarily controls the cases at bar.

United States Shoe reflects this Court's recognition that where the Framers included an express restriction on the federal government's taxing power, that command must be interpreted broadly to ensure that it is given full effect. Thus, given the express restriction on taxation in the Export Clause, this Court was careful "'to guard against . . . the imposition of a [tax] under the pretext of fixing a fee'. . . ." *United States Shoe*, 523 U.S. at 370 (quoting *Pace*, 92 U.S. at 376). Given the similar textual command in the Uniformity Clause that "all Duties, Imposts and Excises shall be uniform throughout the United States," this Court should grant the petitions for certiorari to likewise guard against the federal government's imposition of a *non-uniform* tax under the pretext of fixing a fee.[5]

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5. Even if the Federal Circuit was correct in examining the HMT as applied to imports and domestic shipments under the *Massachusetts* "fair approximation" test, its conclusion that the HMT is a user fee cannot be squared with *United States Shoe*, in which this Court observed that the HMT was not even a "fair approximation of services, facilities, or benefits furnished to the exporters." 523 U.S. at 363. In the export context, the Federal Circuit itself found that "the amount of HMT has *no relationship* to the size or weight of the vessel or the necessary depth of the port required by the vessel." *United States Shoe Corporation v. United States*, 114 F.3d 1564, 1572 (Fed. Cir. 1997) (emphasis added). The calculation of the HMT and the nature of harbor use or services in the import and domestic shipment contexts is no different from the export context.

II. THE HMT VIOLATES THE UNIFORMITY CLAUSE.

The Uniformity Clause mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The HMT statute violates the Uniformity Clause by creating a series of exemptions pertaining to goods unladen at ports in Hawaii, Alaska, the inland waterway system, and a portion of the Columbia River.

In *United States v. Ptasynski*, 462 U.S. 74 (1983), this Court reiterated the well-settled rule that under the Uniformity Clause, a "tax [must] apply, at the same rate, in all portions of the United States where the subject of the tax is found." *Id.* at 84; *see also Knowlton v. Moore*, 178 U.S. 41, 84 (1900) ("[W]herever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."). The HMT statute violates the rule of uniformity because it imposes a tax on commercial activity involving port use, but creates exemptions based on the geographic location where that activity occurs, and on other extraneous considerations.

However, the trial court in these proceedings, the United States Court of International Trade ("CIT"), ruled that it would "invalidate the HMT under the Uniformity Clause only where it finds that Congress' purpose [in creating the exemptions] was to promote regional favoritism or discrimination." *See Thomson multimedia Inc. v. United States*, 219 F. Supp. 2d 1322, 1326 (Ct. Int'l Trade 2002). By substituting a test of subjective intent for the inquiry called for under this Court's precedents, the CIT eviscerated the Uniformity Clause. This Court should therefore grant the certiorari petitions to further delineate the scope of the clause.[6]

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6. The Court should do so even though the Federal Circuit did not address the Uniformity Clause issue given its determination that the HMT is a user fee that is not subject to the clause. For example, in *Carlson v. Green*, 446 U.S. 14 (1980), this Court considered a

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The HMT statute "impose[s] a tax on any port use." 26 U.S.C. § 4461(a). Thus, the subject of the HMT is port use, which, in turn, is defined as the loading or unloading of commercial cargo from a vessel at a port. 26 U.S.C.

(Cont'd)
question that was not even presented in the district court because "the interests of judicial administration will be served by addressing the issue on its merits." *Id.* at 17 n.2. The issue in *Carlson* was "squarely presented [to this Court] and fully briefed," and was "an important recurring issue [that was] properly raised in another petition for certiorari being held pending disposition of this case." *Id.* Review of the Uniformity Clause issue is similarly warranted here, where: (i) more than 1,000 cases challenging the HMT as applied to imports or domestic shipments are being held in abeyance by the CIT pending disposition of the instant certiorari petitions; (ii) the issue was fully briefed in both the Federal Circuit and the CIT in *Thomson* and *CF Industries*; and (iii) the CIT issued a detailed decision in *Thomson* (the reasoning of which was incorporated by the CIT in its *CF Industries* decision) upholding the HMT under the Uniformity Clause.

Furthermore, as is evident from the discussion *infra*, a decision by this Court that the HMT exemptions for Alaska and Hawaii violate the Port Preference Clause would also implicate the Uniformity Clause, as it would require invalidation of the HMT on all domestic shipments and thereby result in complete HMT-exemption for the many ports that accommodate domestic shipments only, despite continued port use at those ports. In other words, the Court cannot strike down the HMT on domestic shipments and leave the HMT on imports standing alone; this circumstance would violate the Uniformity Clause because port use — the lading or unlading of commercial cargo — would continue at a number of ports that accommodate domestic shipments only, but such port use would not be subject to the HMT. Compare 19 C.F.R. § 24.24, designating all ports subject to HMT, with 19 C.F.R. § 101.3, listing Customs ports where imported merchandise may be unladen (the former lists more ports because it includes ports that service domestic shipments but not imports). Given the importance of these issues, this Court should grant certiorari on the Uniformity Clause issue and decide the entire case on the merits.

§ 4462(a)(1).[7] However, domestic port use in Hawaii and Alaska is relieved from the tax by means of a "Special rule for Alaska, Hawaii, and possessions," which reads in pertinent part: "No tax shall be imposed under section 4461(a) with respect to [domestic shipments of cargo unloaded in Alaska or Hawaii]." 26 U.S.C. § 4462(b). Thus, the statute unconstitutionally provides that the tax shall not apply despite the existence of the subject of the tax in Hawaii and Alaska.

Similarly, 26 U.S.C. § 4462(c) provides that no tax will be imposed on the unlading of any cargo if, at some point along its itinerary, the vessel becomes subject to the IWFT imposed under 26 U.S.C. § 4042.[8] In other words, there is no HMT liability whenever a cargo vessel's itinerary touches upon some IWFT river. Here, the HMT statute unconstitutionally provides that the tax shall not apply despite the existence of its subject, due solely to an independent taxable event that arises under an entirely different statute. The HMT creates similar geographic exemptions for ports located along inland waterways[9] and a portion of the Columbia River.[10]

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7. As enacted, the HMT statute provided that cargo destined for export from the United States would be taxed upon lading, while all other cargo would be taxed upon unlading. *See* 26 U.S.C. § 4461(c)(2). As this Court's decision in *United States Shoe* invalidated the HMT on exports, the tax is now assessed solely upon the unlading of cargo.

8. The IWFT, imposed under 26 U.S.C. § 4042(b)(2)(A), is assessed at the modest rate of 20 cents per gallon of fuel consumed on the waterway.

9. *See* 26 U.S.C. § 4462(a)(2)(A)(i) (defining "port" as "any channel or harbor . . . in the United States which is not an inland waterway. . . ."). There are 27 inland waterways in the United States. *See* 33 U.S.C. § 1804.

10. *See* 26 U.S.C. § 4462(a)(2)(C) (defining "port" to include the channels of the Columbia River in Oregon and Washington only

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All of these exemptions operate to remove actual port use from the purview of the tax, even though the ports involved require and receive harbor maintenance services funded by revenue generated from HMT assessments. Under these circumstances, none of the exemptions can be squared with this Court's Uniformity Clause precedents.

Stated another way, unlike this Court's decision in the *Head Money Cases*, 112 U.S. 580, 595 (1884), the "evil to be remedied by [the tax] legislation" — navigational impediments in this case — exists at the exempted ports. *See id.* at 594-95 (per capita excise tax on immigrants assessed at water ports but not inland ports did not violate the Uniformity Clause because there was no immigration at inland ports); *see also Ptasynski*, 462 U.S. at 82 (explaining that in *Head Money Cases*, "[t]he tax applied to all ports alike. . . .").[11]

The *Ptasynski* Court also observed that if Congress "frame[s] a tax in geographic terms," courts must "examine the classification closely to see if there is actual geographic discrimination." 462 U.S. at 85. Here, the HMT exemptions create actual geographic discrimination among ports in violation of the Uniformity Clause by encouraging vessels to unlade at HMT-exempt ports, as ports that are subject to the HMT (and which subsidize harbor maintenance at exempt

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up to the downstream side of Bonneville lock and dam, which is located roughly at Columbia River Mile 144). This special rule creates a unique tax immunity covering approximately 47 miles of the Columbia River where neither the HMT nor the IWFT applies. *See* 33 U.S.C. § 1804(8) (providing that the IWFT shall apply at Columbia River Mile 191.5 and points upstream).

11. In *Ptasynski*, the Court also found no Uniformity Clause violation because the exemptions were not drawn along state political lines, a clear distinction with the HMT exemptions for Alaska and Hawaii. *See* 462 U.S. at 78.

ports) are less attractive destinations for commercial cargo. The Port of Bienville in Mississippi illustrates the advantage for inland waterway ports created by the HMT. Bienville is a customs port of entry, situated on the Pearl River a few miles north of the Gulf of Mexico. Because the Pearl River is a designated inland waterway, imported merchandise that is entered at Bienville (or domestic cargo unladen at Bienville) is not subject to the HMT. *See* 19 C.F.R. § 24.24.

Furthermore, the exemption for cargo on vessels subject to the IWFT creates unconstitutional competitive advantages for ports in close proximity to an inland waterway. Shippers of domestic or imported cargo can plan their itineraries so that their vessels traverse a nearby inland waterway before or after unlading, thus incurring a negligible IWFT expense, which negates HMT liability.[12]

Accordingly, the HMT exemptions violate the Uniformity Clause by allowing a variety of port use to escape the tax, and by producing competitive advantages and disadvantages among ports that give rise to actual geographic discrimination.

III. THE HMT VIOLATES THE PORT PREFERENCE CLAUSE.

The Port Preference Clause provides in pertinent part, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ." U.S. Const. art. I, § 9, cl. 6. Had the Federal Circuit abided by this Court's Port Preference Clause precedents, it would have found the preferences contained in 26 U.S.C. § 4462(b), which establish HMT exemptions in

12. In this regard, the Court should take particular note of the port shopping incentives that emanate from the designation of the 1,192 mile Atlantic Intracoastal Waterway, and the 1,134.5 mile Gulf Intracoastal Waterway, as inland waterways. *See* 33 U.S.C. §§ 1804(6) and 1804(11), respectively.

favor of ports in Hawaii and Alaska, unconstitutional. Accordingly, the Court should grant the certiorari petitions in order to preserve the integrity of the Port Preference Clause, which was vitiated by the Federal Circuit's decision.

As the Federal Circuit acknowledged, HMT assessments do not affect each State's commerce in the same way: "[T]he statute explicitly exempts from the HMT domestic cargo (excluding crude oil) either unloaded in Hawaii, Alaska, or U.S. possessions or unloaded in the continental United States and shipped from Alaska, Hawaii, or a U.S. possession. [26 U.S.C.] § 4462(b)." *Thomson*, 340 F.3d at 1357; *see also id.* at 1366 ("It is true that domestic shipments — except for crude oil shipments out of Alaska — that arrive in the ports of [Alaska or Hawaii] will not be subject to HMT liability.").

Despite these naked preferences, the Federal Circuit upheld the HMT because

> the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions.

Thomson, 340 F.3d at 1366. Thus, the Federal Circuit looked to the *subjective intent* of Congress in fashioning port preferences and concluded that the clause "prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports." *Id.* at 1365. The Federal Circuit's novel interpretation of the Port Preference Clause — the court itself conceded that no case directly supports such an approach (*see id.*) — is inconsistent with this Court's precedents and therefore should be overruled.

In *Knowlton v. Moore*, 178 U.S. 41 (1900), this Court ruled that "[t]he substantial effect of the [Port Preference Clause] . . . was to require that all regulations of commerce or of revenue affecting commerce through the ports of the States should be the same in all ports." *Id.* at 104 (emphasis omitted). Although the Federal Circuit acknowledged that the HMT is assessed differently with respect to ports in Alaska and Hawaii, it failed to cite, let alone distinguish, *Knowlton*. *See Thomson*, 340 F.3d at 1357, 1366. Had the Federal Circuit followed *Knowlton*, it would have been constrained to declare the HMT unconstitutional.

In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), this Court explained the direct, objective proscription contained in the Port Preference Clause regarding preferences in the form of "privileges or immunities" granted by Congress:

> [T]hese privileges and immunities, whatever they may be in the judgment of congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by congress to this effect. . . .

59 U.S. at 435. *Wheeling's* ruling that "privileges or immunities" granted by Congress — which terms surely encompass the exemptions at issue here — "shall be common and equal in all the ports of the several States," *id.*, categorically bars the Federal Circuit's position that subjective congressional intent underpins Port Preference Clause analysis.

Contrary to the Federal Circuit's statement that this Court's precedents "do not support the proposition that a statute with explicit exemptions of states to *prevent* disparate effects violates the [Port Preference] Clause," *Thomson*, 340 F.3d at 1364-65, *Wheeling* directs a court to determine simply whether Congress has enacted "some positive legislation" that provides a "direct privilege or preference" for the ports of any particular State. If such an assessment does not apply "common[ly] and equal[ly]" in the ports of each State, it violates the Port Preference Clause. *Wheeling*, 59 U.S. at 435. As the Federal Circuit correctly recognized that HMT assessments do not apply commonly and equally to port use in Alaska and Hawaii, *Wheeling* and *Knowlton* require reversal of its decision.

Moreover, by reading the element of subjective intent into the Port Preference Clause, the Federal Circuit transgressed the inveterate canon of constitutional construction that courts should give effect to the plain meaning of a constitutional prohibition unless doing so would produce an absurd result that is inconsistent with the spirit of the Constitution. As Chief Justice Marshall explained:

> It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. *The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.*

Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644-45 (1819) (emphasis added).

Thus, even if the Framers of the Port Preference Clause did not contemplate the type of preferences at issue here, the HMT exemptions involving Alaska and Hawaii nevertheless create "preferences" under the plain language of the clause. Moreover, no credible argument can be made that declaring the HMT unconstitutional under the Port Preference Clause would produce an absurd result repugnant to the Constitution. As the Federal Circuit's decision conflicts with the canon of constitutional interpretation announced in *Woodward*, it should be reviewed by this Court.

IV. THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE TO THE IMPORTING COMMUNITY.

In addition to their significance from a constitutional standpoint, the issues presented are of great economic importance to the United States importing community. Virtually all waterborne import commerce, entering the United States through over 190 ports located in more than 30 States, is subject to the HMT. *See* 19 C.F.R. § 24.24. The HMT applies without regard to the type of product imported or whether the goods are subject to customs duties.

The ad valorem HMT imposes a particular burden on imports, as "[k]ey imports tend to consist of higher value commodities (e.g., electronics, automobiles, etc.). . . ." Department of the Army, Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999, at 13 (Feb. 2001). Overall, as reported by the Department of Transportation Maritime Administration, the value of waterborne imports in 2001 (the latest year for which statistics are available) exceeded $523 billion[13] and approximately $500 million in HMT is collected from importers each year. The fiscal importance of the issues

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13. *See* U.S. Imports by U.S. Customs District and Port – 2001, *at* http://www.marad.dot.gov/statistics/usfwts/imp2001.htm. (last updated April 23, 2002).

presented in these cases warrants issuance of the writs of certiorari. *See United States v. Hill*, 506 U.S. 546, 549 (1993).

CONCLUSION

For the foregoing reasons, amicus curiae American Association of Exporters and Importers respectfully urges this Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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